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In the

United States Court of Appeals

For the Seventh Circuit

No. 11969

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Honorable
Win G. Knoch,
Judge Presiding.

Brief and Appendix of Appellant

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Summary of Argument.

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UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HERMAN DAVID, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Win G. Knoch, Judge Presiding.

Brief and Appendix of Appellant

May It Please The Court:

STATEMENT OF FACTS.

The defendant, Herman David, was convicted by the Court after a trial without a jury of the charge hereinafter set forth in the indictment, and was sentenced to imprisonment for a period of two years.

The Indictment.

The indictment consisted of two counts. Count One charged that the defendant on November 20, 1953 did unlawfully have in his possession five (5) gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed upon such spirits, as required by law; in violation of Section 2803(a), Title 26, United States Code.

Count Two charged that the defendant, on said date did unlawfully and willfully remove, deposit and conceal certain goods and commodities, to wit, five (5) gallons of distilled spirits, for and in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax; in violation of Section 3321(a), Title 26, United States Code. (App. 10.)

Proceedings Before the Trial.

The defendant filed a petition to suppress certain evidence. In said petition he has alleged (App. 10-14.)

"On November 20, 1953, while he was seated in an automobile, owned by him, on the south side of East 45th Street just west of the corner of 45th Street and South Vincennes Avenue in the City of Chicago, Illinois, two agents, Fred D. Roseboro and Carl Hanbach, employees of the Alcohol Tax Unit, a branch of the Treasury Department of the United States of America, placed your petitioner under arrest and took him into custody and searched the said automobile and found therein three one gallon glass jugs containing alcohol that were in a shopping bag, and two one gallon glass jugs containing alcohol, which were in another shopping bag. Both of these shop-

ping bags were in the back of the automobile on the floor thereof between the back seat of the automobile and the front seat thereof.

"At the said time and place the said jugs of alcohol were possessed by and owned by your petitioner.

"At the time that your petitioner was seized and taken into custody, the aforesaid agents did not have a warrant for his arrest, nor a search warrant to search either him nor the aforesaid automobile, or any process of any kind, or any authority of any law.

"The said arrest of your petitioner by the said agents was illegal and the search made by the said agents was illegal, in that, the said search and seizure of the said jugs and alcohol was not made pursuant to and incidental to a lawful arrest, and the said seizure of the said jugs and the said five gallons of alcohol was unlawful, and both the search and seizure were in violation of the 4th and 5th Amendments of the Constitution of the United States of America.

"Your petitioner is informed and believes, and based upon such information and belief so states the fact to be that there was no sufficient knowledge of facts or circumstances to justify a man of prudence and caution to believe that a violation of the laws of the United States of America was then and there being violated, and your petitioner is informed and believes that the said United States of America, Plaintiff, expects to use said illegally seized property as a result of the said illegal search together with everything procured by said plaintiff as the result of information and clues procured from the said search and seizure against your petitioner on a trial of the above entitled cause.

"Your petitioner further represents that the use and evidence against your petitioner on the trial of the above entitled cause of the property described, to-wit: five gallons of alcohol, or any part thereof, and the use of any and all evidence obtained by the United States of America as a result of information and clues from the said unlawful search and seizure is in violation of the rights of your petitioner under the 4th and 5th Amendments to the Constitution of the United States."

A hearing was had on the motion to suppress. When the cause came on for trial, the defendant waived a trial by jury (App. 26) and on stipulation of the parties, by their attorneys, it was ordered that the evidence which had been presented on the motion to suppress evidence "shall be submitted to the Court as evidence on the question of the guilt or innocence of the defendant" (App. 26).

The Court in a memorandum opinion denied the defendant's petition to suppress evidence (App. 22-24).

The Evidence on the Motion to Suppress.

Herman David, the Petitioner, testified (App. 33-42) that on or about November 20, 1953, at about 10:30 A.M., he was in the neighborhood of 45th Street and Vincennes Avenue, Chicago, Illinois, driving east on 45th Street (App. 33.) It seemed as if a tire was going flat, and he parked his car.

A man came up to him and told him that he was under arrest. He had no warrant of arrest with him, nor a search warrant (App. 34.) David had five one-gallon jugs containing spirits in the back of his car. These jugs were about eleven inches high and were in bags, and these were, in turn, in shopping bags. The tops of the bags were about eight to ten inches above the top of the jugs. Paper was on top of the bottles, which were not visible to anybody who might look into the bags (App. 35.)

The necks of the bottles were about two inches high. The men who arrested David took the automobile and the jugs (App. 36.)

On cross examination David testified that he had just parked his car when the men came up to his car (App. 37.) He testified that he was not about to make a delivery of five gallons of alcohol to 4502 S. Vincennes Avenue (App. 38, 39.)

Carl G. Hambach, an Investigator for the Alcohol Tax Unit, Bureau of Internal Revenue, testified (App. 42-62) that he had occasion to make an investigation of Herman David, first beginning in the latter part of February or the first part of March, 1953 (App. 43.) He saw David on November 6th, 12th, 13th and 20th, 1953 (App. 44.) On November 6 he was watching David's home in Dolton and saw him leave in a Packard automobile, accompanied by a lady and a Boxer dog. He followed the automobile and dropped him at South Park and 45th Street. There he contacted Investigator Fletcher on the radio (App. 44, 45.)

Hambach further testified that he saw the defendant around the latter's home in Dolton on November 12, and 13, followed him, but lost him in town and did not see where the defendant went (App. 45.) On November 20 he saw the petitioner park his car at the curb on 45th Street, just west of Vincennes Avenue, and talk to Investigator Roseboro. Through the window he was able to see in the back of the car a paper bag that contained three one-gallon glass jugs. Investigator Roseboro *had taken* the cap off one of them and tasted it and said "It's alcohol." I said to David, "You're under arrest" (App. 46.) He talked to David at the Alcohol Unit office, and David told him that he was in financial difficulty; that he was buying alcohol from a fellow on the South Side for $6 a gallon, and selling it for $7 (App. 47.)

Hambach further testified that he knew that Mr. David had been arrested several times and, over objection, was permitted to testify that he was convicted of an alcohol tax violation (App. 47.) He was asked, on direct examination, whether the neighborhood of 45th and Vincennes meant anything to him and, over objection, he stated that on the second floor at 4502 Vincennes Avenue, a man known as Big John has operated a speakeasy for several years, and the place had been raided and seizures made there several times. The court stated, on motion that this testimony be stricken, that he would review it later. The witness never saw the defendant on 4502 South Vincennes (App. 49.)

On cross examination he stated that the shopping bags were submitted to "our" fingerprint man, who found some prints but could not testify. (He has since died.) The fingerprint man was alive at the time when hearing was had before Commissioner Pike, but he was not present at that time (App. 50.)

Hambach testified further, on cross examination, that Investigator Fletcher took samples from the jug, and the rest of the alcohol and jugs were destroyed (App. 50.) He did not attach any importance to the fact that there might be some conflict between his testimony and that of Mr. David with respect to the height of the bottle and the height of the top of the bags (App. 50.)

On further cross examination, the witness testified that he suspected the petitioner was going to deliver something to 4502 Vincennes Avenue, but did not wait to see whether he would get out of the car and take any alcohol up to 4502 Vincennes Avenue and arrest him there, because when he got to 45th and Vincennes Investigator Roseboro

was already at the car (App. 52, 53.) The witness was not positive whether he testified, before Commissioner Pike, as to any conversation he had had with Mr. David (App. 53.) At the time of the arrest of the petitioner, he had neither a warrant for Mr. David's arrest nor did he have a search warrant in his possession (App. 55.) He saw a bag with the three one-gallon glass jugs in it. The bags were about two feet high. The jugs were about ten to twelve inches high. He could not tell what was in the bottles at the time he looked in the car (App. 58.) The liquid was colorless; it might have been water.

Hambach never saw the petitioner go into the place at 4502 Vincennes Avenue (App. 59.) He testified that "we had received information from a reliable source that he (David) was delivering alcohol to this address. This reliable source was an informer, Willie Jones. The witness did not know where Willie Jones lived. Jones used to call him from time to time, and he would meet Jones at appointed places on the South Side. Jones did not call him (the witness) on this occasion, November 20 (App. 59, 60.) He first met Jones two or three years ago on the South Side, in a raid; he didn't know where this Willie Jones lives (App. 60, 61.)

The witness testified before Commissioner Pike on July 9, 1954. At that time the witness stated that it's possible that this question was asked and that he made this answer:

"Q. Who did you get your information from?

"A. Well, that's from a confidential informer whose name I would refuse to divulge." (App. 61.)

If that question was asked, that is probably the answer the witness gave. Hambach never raided the premises at 4502 Vincennes Avenue. He never arrested the man there (App. 61.) He has seen the man about the premises. He is a colored man, known as Big John (App. 62.)

Fred D. Roseboro, an investigator in the Alcohol Tax Division, testified (App. 62-72) that he had occasion, in his official capacity, to investigate the petitioner (App. 63.) He saw David on November 20, 1953. He didn't see the petitioner prior to that date. On November 20, 1953, he saw David in an old Packard sedan parked near the corner of 45th and Vincennes Avenue. He asked David what he had in the car, and David answered "Nothing." The witness saw two shopping bags on the floor, in the back of the car. He saw the neck of what appeared to be one-gallon glass jugs (App. 64.)

He said to David: "You have moonshine in this car. I can see it in the back of the car. I am going to search the car." David asked Roseboro whether he had a search warrant and Roseboro replied, "I don't need a search warrant." (App. 65.)

The witness took one jug out of one of the shopping bags, and one out of the other. He unscrewed the top, dipped a finger into the colorless liquid in the jugs and tasted and smelled it, and found it to be distilled spirits. He *then* placed David under arrest (App. 65.)

Roseboro was familiar with the neighborhood of 4502 S. Vincennes Avenue. Over objection he said that he knew it was the place of a known bootlegger who resided at that address (App. 66.)

On cross examination, the witness testified that he saw the *necks* of two jugs but did not see the liquid at that time (App. 66.) He stated to David: "You have moonshine in the car," or "You're transporting moonshine in the car." Roseboro did not see any moonshine in the car at that time or prior thereto (App. 66, 67.) He had no search warrant at the time, nor a warrant for the arrest

of David. At the time he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and that is what he did: put his finger in the bottle in order to taste it and to smell it (App. 67.)

The witness presumed that the glass jugs were destroyed. They were turned over to Investigator Fletcher. He did not recall ever asking Fletcher where those jugs were, prior to coming to court (App. 67.) He estimated the bags as being 10 or 12 inches in height, he did not measure them. The necks of the bottles were about 1½ or 2 inches long. The liquid in the jugs came to the top of the necks of the bottles. The necks are narrow, about 2 inches in height.

Roseboro testified, under oath, before Commissioner Pike on July 19, 1954. At that time he could have testified that the bags were two feet in height. That was his best recollection at the time; and he would say that his recollection at that time was better than at the time of his present testimony (App. 70.)

Roseboro could not recall ever being at the premises at 4502 S. Vincennes prior to November 20, 1953. He never made an arrest there, nor made a raid prior to November 20, 1953. He could not recall whether the jugs had handles on them (App. 70, 71.) On redirect, he did not notice anything wrong with David's automobile when he drove it away; it was about ten or twelve years old (App. 71.)

Columbus Fletcher, a Government Alcohol Agent, testified (App. 72-84.) that he first saw the defendant on November 6, 1953, and again on November 20, 1953 (App. 73.) On November 6, 1953, he saw the defendant park his car on the southwest side of 45th and Vincennes (App. 73.)

The witness at that time was on an adjacent corner. After David parked his car, he sat therein for approximately five minutes, then he got out of the car, looked around and took two shopping bags out of the rear of the automobile. Fletcher saw David take the two shopping bags into the side entry of the building located at 4502 South Vincennes. After the passage of 10 minutes, he saw David come out of the building carrying two empty shopping bags (App. 74); David then drove away. He saw nothing further on November 6. On November 20, accompanied by Roseboro, he saw David at about 10:30 in the morning at 45th and Vincennes. He saw Roseboro take one of the jugs from the rear of the car, unscrew it, taste and test the contents, and heard Roseboro say it was moonshine (App. 75.)

Investigator Hambach came up then and told David he was under arrest (App. 75.) The witness took a *composite* sample from all five jugs on November 20 and transmitted it to the chemist for analysis. This was placed in a one-pint bottle (App. 76.)

On cross examination the witness testified that on July 9, 1954 he did not appear before Commissioner Pike, nor was he asked to appear (App. 78.) Roseboro and Hambach knew about the facts to which the witness had testified on or about July 9, 1954. The first time the witness discussed this case with anybody in the District Attorney's office was the morning that he testified (App. 78, 79.) On November 6, 1953, he did not look in the shopping bags that David carried, nor did he attempt to make an arrest at that time (App. 80.) Immediately after David entered 4502 South Vincennes Avenue he did not seek a search warrant, nor did he make any arrest at 4502 Vincennes thereafter (App. 80.) To his knowledge, nobody else made an arrest (App. 81.) At the time David was carrying the bags across the street, on November 6, Fletcher did not

try to look into the bags. His duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrests if the violations occurred in his presence (App. 81.)

Fletcher was at the office of the Alcohol Tax Division at the time David was brought in (App. 83.) He remained for approximately an hour. There was conversation between Roseboro and David. David was asked about his financial status, and the witness thought that David answered that he had no financial status. Fletcher could not recall the exact conversation, nor could he recall any conversation between David and Hambach (App. 84.)

Herman David, being recalled, testified he did not know any person by the name of Willie Jones, nor could he recall ever meeting a person by that name. He denied the conversation that Mr. Hambach testified to, in which Hambach asked him about his financial status and that David said he was hard up and had to sell or bottle some alcohol (App. 85.)

Additional Evidence at Trial.

The Assistant District Attorney stated that there would be no additional evidence introduced in the trial of the case and that the testimony would be the same as was presented on the motion to suppress (App. 26.) However, in order that the Government's record might be complete, since the attorneys' memories were not too clear, it was stipulated that the contents of the jugs which were seized contained alcohol and that the containers bore no Internal Revenue stamps. It was further stipulated that venue had been proved (App. 27.)

It was stipulated that Government witnesses would identify Herman David as the defendant in the case (App. 28.)

It was agreed that if the chemist were present he would testify that Exhibit 1, the pint bottle, contained alcohol. This stipulation was subject to the defendant's objection that the evidence is inadmissible because of an illegal search and seizure. The Court overruled the objection and ordered the evidence as stipulated be admitted to evidence (App. 29.)

It was further stipulated that Mr. David's residence at Dolton, Illinois, is in the Northern District of Illinois, Eastern Division.

It was during the foregoing stipulations that the testimony presented on the motion to suppress was received in evidence (App. 29.)

Defendant's counsel made a motion for judgment of acquittal and the same was denied (App.); the Court then found the defendant guilty of the charge in the indictment (App. 30; 88.) The Court ordered the defendant committed to the custody of the Attorney General for imprisonment for a period of two years (App. 88.)

CONTESTED ISSUES.

I.

Whether the Federal alcohol agents had sufficient probable cause to search the defendant's automobile and to seize the alcohol therein.

II.

Whether the admissible evidence proved the defendant guilty of the charge in the indictment beyond a reasonable doubt.

PROPOSITIONS OF LAW RELIED ON.

A. The result of an unlawful search and seizure does not convert it into a lawful one.

Byars v. *United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248.
United States v. *Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22.

B. Where a litigant refuses or fails to produce evidence exclusively under his control, a presumption arises that such evidence would be unfavorable to him and favorable to his opponent.

Scanlon v. *United States*, 223 F. 2d 382, 392.

C. There was no probable cause sufficient to authorize the Federal officers to search defendant's automobile without a warrant.

Gambino v. United States, 275 U.S. 310, 48 S. Ct. 137, 72 L. Ed. 293.
Emite v. United States, 15 F. 2d 623.
United States v. Allen, 16 F. 2d 320.
Brown v. *United States*, 4 F. 2d 246.
Moring v. *United States*, 40 F. 2d 267.
Wisniewski v. *United States*, 47 F. 2d 825.

ARGUMENT.

I.

A. The result of an unlawful search and seizure does not convert it into a lawful one.

B. Where a litigant refuses or fails to produce evidence exclusively under his control, a presumption arises that such evidence would be unfavorable to him and favorable to his opponent.

C. There was no probable cause sufficient to authorize the Federal officers to search defendant's automobile without a warrant.

It is manifest from the foregoing testimony of the three investigators for the Alcohol Tax Bureau that the following facts and situation existed in connection with the arrest of the defendant, and the search and seizure of distilled spirits found in his car, on November 20, 1953:

1. None of the Government agents had a search warrant to search the car of the Defendant, nor a warrant for his arrest.

2. None of the investigators had any information from an informer, or otherwise, that the Defendant would have distilled spirits in his possession on November 20, 1953.

3. Prior to the search of the Defendant's car, the agents did not know that distilled spirits were in the car.

4. Roseboro, the agent who made the search, could only see the necks and a couple of glass jugs, and could not see any liquid in the jugs as they rested in shopping bags.

5. The glass jugs were from 10 to 12 inches in height, and the shopping bags which contained them were about 20 inches in height or more.

6. The liquid in the glass jugs was colorless, and without tasting or smelling the contents, could have been water, mineral oil, distilled white vinegar, or any similar colorless liquid.

7. Roseboro had to taste and smell the liquid, by inserting a finger therein, before he knew that the liquid was distilled spirits.

The result of an unlawful search and seizure does not convert it into a lawful one. In the case of *Byars* v. *United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248, the Supreme Court held:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks* v. *United States*, 232 U.S. 383, 393, 58 L. ed. 652, 655, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States*, 255 U.S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 261; *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391, 64 L. ed. 319, 321, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; *Agnello* v. *United States*, 269 U.S. 20, 33, 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

Similarly, in the case of *United States v. Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22, the Supreme Court stated:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.
>
> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

The agents stated that 45th and Vincennes was a neighborhood in which a known bootlegger, "Big" John, lived. The address is stated to be 4502 S. Vincennes Avenue, yet none of the agents ever arrested "Big" John, nor, prior to November 20, 1953, none of them had ever been in the premises during said period, none of them had raided the premises, none had seen any distilled spirits on the premises, and none had seen distilled spirits carried into the premises.

True, Agent Fletcher stated that he saw the Defendant carry two shopping bags into the building at 4502 S. Vincennes Avenue, but he did not know what was in the shopping bags. After the shopping bags were delivered at 4502

S. Vincennes Avenue no attempt was made to obtain a search warrant for the search of the premises and the seizure of any contraband.

We find that the distilled spirits, illegally seized, are missing. Only a pint thereof has been preserved for use in the trial of the Defendant, if the same becomes necessary. The shopping bags are missing, and the glass jugs are missing. It is a strange situation, indeed, that agents can determine what portion of the evidence seized they shall bring into court on the trial. Production of the shopping bags and the glass jugs would show the relative size of each, and it could be very easily determined, by placing the jugs within the bags, whether anybody could see even the necks of the glass jugs. Where evidence is in the possession of an adverse party, and he fails to produce the same, the presumption arises that the said evidence would be unfavorable to him. *Scanlon* v. *United States*, 223 F. 2d 382, 392.

In the case of *Emite* v. *United States*, 15 F. (2d) 623 (C.A. 5), a search was made of an automobile moving on a public highway; the automobile was stopped by federal officers. The Court of Appeals observed:

> "The testimony of the witness, not only did not show that, before the search was made, the officers had probable cause to believe that an offense had been committed, but indicated the absence of such probable cause. Probable cause did not exist, unless the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. *Carroll* v. *United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; *Pales* v. *Paoli* (C.C.A.) 5 F. (2d) 280.

"The facts and circumstances which the testimony showed were within the knowledge of the two officers before the search was started furnished no basis for a reasonable belief or inference that the searched car contained intoxicating liquor. The facts that an automobile moving on a public highway appears to be heavily loaded and is driven carefully are entirely consistent with a legitimate use of it, and do not warrant a reasonable belief that it is being used as a means of committing a criminal offense. The testimony indicated that the officers had no knowledge or information of any illegal use of the searched car, or that its owner or an occupant of it had committed or intended to commit any criminal offense. The testimony as to what the witness had been told did not indicate that his informant was trustworthy, or that he even claimed to know that what he said was true.

"Evidence of the fact that an automobile of an employee of an ice manufacturer was seen parked on the employer's premises, where some unidentified person said automobiles used in hauling liquor from the employer's plant were parked, plainly would not, by itself, or in connection with evidence of the fact that that automobile, when apparently heavily loaded, was seen on a public highway, where it was being carefully driven, be enough to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in that automobile. A search without warrant of an automobile is not justified by a mere suspicion, based on the facts that it came from a small town having the reputation of being a haven for bootleggers, and that it had been seen parked on an ice manufacturer's premises which were said to be used for parking cars which hauled liquor from that place.

"On its face the testimony of the witness negatived the conclusion that, prior to the search of the automobile, the witness or the other officer, by the use of their senses or otherwise, had learned of facts that would warrant a reasonably prudent man in believing

that it then was being used in transporting liquor, or in the commission of any other crime. It appearing on the face of the testimony that the knowledge of the witness of the fact that the automobile contained intoxicating liquor was obtained by a search made without a warrant, and without probable cause to believe that a crime was being committed in his presence, that testimony was subject to be excluded on the ground that the knowledge of the witness of the incriminating facts deposed to was obtained by a violation of the constitutional provision against unreasonable searches. We conclude that the above-mentioned ruling was erroneous. Because of that error, the judgment is reversed; and the cause is remanded for another trial."

In the case of *United States* v. *Allen*, 16 F. (2d) 320, (D.C., Fla.), a prohibition agent testified that he had "information that some automobiles were going to haul whiskey over this road that night." The kind of automobile that he was looking for was a master six Studebaker sedan, a Ford coupe, a Dodge truck and a Studebaker roadster. On the night in question he saw a Studebaker automobile followed by a Ford coupe; he did not see who was in the car and did not see the contents of the car. His conclusion that the Studebaker car was used for transportation of alcoholic liquors was based upon his observation that "it appeared to be loaded and was rather dirty; appeared to be on a long drive—had mud on the back part of the spare tire cover and fenders."

The agent stopped the car but did not know that it contained intoxicating liquor until after that time. The Court stated:

"The government, in urging the admission in evidence of the liquors in question, relied entirely upon the holding of the United States Supreme Court in the case of *Carroll et al.* v. *United States*, 267 U.S. 132, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790. The rule of law controlling the question of search and seizure

of automobiles on the public highways, without the aid of search warrants, is clearly and distinctly laid down in the *Carroll* Case. This rule is to the effect that such searches and seizures are legal when the facts and circumstances within the knowledge of the seizing officers, and of which they have reasonable trustworthy information, are such in themselves to 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile * * *' which is the subject of such seizure."

Quoting from Mr. Chief Justice Taft in the *Carroll* case, the Court said:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary. * * * But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search, unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise."

The Court concluded:

"In my opinion, the facts in this case are not such as would 'warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched', that the search and seizure, measured by this rule laid down in *Carroll* v. *United States, supra,* was unreasonable and in violation of the Fourth Amendment to the Constitution.

"The objection of the defendant to the introduction in evidence of the intoxicating liquor so seized will be sustained."

In *Gambino* v. *United States*, 275 U.S. 310, 48 S. Ct. 137, 72 L. ed. 293, the facts were briefly stated at page 312 of the official report as follows: "On August 1, 1924, Gambino and Lima were arrested by two New York state troopers, near the Canadian border; their automobile (while occupied by Gambino and therefore within the protection accorded to his person) was searched without a warrant; and intoxicating liquor found therein was seized."

At page 313 of the official report, the Supreme Court stated that there was not probable cause for the search in the following terse language: "We are of the opinion on the facts, which it is unnecessary to detail, that there was not probable cause."

In another interesting case, *Brown* v. *United States* (C.A. 9) 4 F. 2d 246, the Court made the following observations of fact and law:

> "'If the seizure is merely based upon a suspicion, and the facts are not sufficient to justify an arrest, the subsequent discovery by an examination of the evidence, secured by the seizure, that the suspicion was in fact well founded, is not sufficient to make what was unlawful at its commencement a lawful search. • • • The proper test, supported by the great weight of authority, by which this case should be decided, is: Were the circumstances presented to the officers through the testimony of their senses sufficient to justify them in a good-faith belief that plaintiff in error was in their presence transporting liquor in violation of law or that he had in their presence liquor in his possession in violation of law? In other words, was there probable cause for them to so believe, or were the facts sufficient to give rise merely to a suspicion thereof? If the former the arrest was legal and the evidence secured by it admissible. If the latter, the arrest was illegal, and the evidence obtained not admissible' *Garske* v. *United States*, (C.C.A.) 1 F. 2d 620, 625.

"The officer who made the arrest was the only witness at the trial. He testified that the plaintiff in error parked his car at the curb of one of the public streets of the city of Portland, removed a package from the back part of the car, and started up the street; that the package was not smooth, and from its appearance might contain bottles; that he then placed the plaintiff in error under arrest; that prior to that time he had been informed that the plaintiff in error was a bootlegger, and that the license number of the car driven by the plaintiff in error had been furnished him but the source of his information was not disclosed in either case; that on another occasion the plaintiff in error had delivered a package at an office building in the city, and that the form of the package indicated that it might contain two bottles, but what the package contained he did not know, nor did he know what the package in this case contained. Beyond the foregoing, the officer had no knowledge of any kind, and no information from any source, that a crime *was being* committed in his presence. He testified repeatedly that he had no such knowledge, and that he acted on suspicion only. While an officer may arrest without warrant for reasonable cause, he can only act upon evidence; he cannot act upon mere suspicion.

"If, instead of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true. If we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property wrongfully seized was not admissible in evidence.

"The judgment is therefore reversed, and the case is remanded for a new trial."

In the case of *Moring* v. *United States*, 40 F. 2d 267 (C.A. 5), the appellant was the owner of two automobiles which Government officers stopped. The appellant was riding in the automobile in front and the one in the rear was being driven by another under his direction. Search was made without appellant's consent, and the liquor that was seized was found in the automobile in which he was not riding. The Court of Appeals stated:

> "The officers had no reasonable cause to believe or suspect that either of the automobiles contained liquor, but stopped them to see whether they did or not. Under these circumstances we are of opinion that they were without authority of law to stop or search the automobiles, and that it was error to base a conviction upon evidence seized upon such search. Evidence discovered upon an unlawful search is inadmissible, and a conviction cannot be based upon it. The case is controlled by our decision in *Emite* v. *United States*, 15 F. 2d. 623."

An important decision on the question under discussion is *Wisniewski* v. *United States* (C.A. 6) 47 F. 2d 825, 826. This case holds that information from a so-called informer, without more, is insufficient to constitute probable cause. A much stronger case as to probable cause appears in the *Wisniewski* case than that which appears in the instant, David situation. The facts and conclusions of the Court in the *Wisniewski* case are as follows:

> "In the instant case the chief objection of appellant is based upon the fact that the source of information of the arresting officers was not disclosed either by naming the informer, describing his exact relationship to the department and the source of his information, or otherwise. The arresting officers testified that on August 23, 1930, they had been 'informed' that the defendant, who was said to be dealing in intoxicating

liquors, was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the city of Grand Rapids; that similar information had been received on four previous occasions from the same informer with reference to others, and that it had on each such other occasion proved reliable; and that the delivery was to be made either in a Studebaker sedan bearing license No. 594,190, or in an Essex coach bearing license No. 594,191. They also testified that before the time in question information had been received from the deputy administrator that defendant was selling whiskey at his meat market.

"*With this information as the basis for suspicion, possibly insufficient in itself to constitute probable cause,* the officers went to the vicinity of defendant's place of business for purposes of observation. They testified that while there they saw the defendant talking to a known bootlegger, and that he got a burlap sack and a jug out of the bootlegger's car and placed it in the Essex coach which had been previously identified by its license number. Shortly thereafter the defendant left his place of business, got into the Essex coach, and drove away. About ten minutes later he returned and stopped nearby. The arrest thereupon followed. At the time of the arrest defendant was still in his Essex coach and beside him upon the seat was the jug covered by the burlap sack. The jug contained three gallons of whiskey." (Emphasis supplied).

CONCLUSION.

From a comparison of the testimony and evidence in the *David* case with the facts recited in the foregoing decisions and the application of the principles of law recited therein, it seems manifest that there was no probable cause whatever for the Federal agents to search the defendant's automobile without a search warrant and to seize the alcohol therein and to arrest the defendant without a warrant. The defendant's motion to suppress the evidence seized should have been allowed; and since there was no other admissible evidence against the defendant, he should have been found not guilty of the charge in the indictment. Hence, the defendant respectfully asserts that the judgment against him should be reversed by this Honorable Court.

Respectfully submitted,

MYER H. GLADSTONE,
Attorney for Defendant-Appellant

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In the

United States Court of Appeals

For the Seventh Circuit

No. 11969

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. HERMAN DAVID, *Defendant-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. Honorable Win G. Knoch, Judge Presiding.

Appellant's Appendix

IN THE UNITED STATES DISTRICT COURT

• • (Caption—No. 55 CR 110) • •

STATEMENT PURSUANT TO RULES 12(c) AND (d) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

1. The above entitled suit was commenced by an indictment filed February 25, 1955.

2. The names of the original parties are the United States of America, Plaintiff, and Herman David, Defendant. No change has taken place in the parties to the suit.

3. The Attorney for the Plaintiff is Robert Tieken,

whose address is United States Court House, Clark and Adams Streets, Chicago 4, Illinois.

4. Defendant was arrested and gave bail in the sum of $500.00.

5. The Defendant pleaded not guilty on March 18, 1955.

6. Defendant filed a motion to suppress evidence on May 5, 1955; the said motion was denied on February 10, 1956.

2 7. Trial was had on September 21, 1956 before the Honorable Judge Joseph Samuel Perry, without a jury.

8. The Court found the Defendant guilty and entered judgment on November 19, 1956, sentencing the Defendant to the custody of the Attorney General for a period of two years.

9. Notice of Appeal was filed on November 28, 1956.

10. Defendant is at liberty on an Appeal Bond in the sum of $3,000.00.

Myer H. Gladstone
Attorney for Defendant
Herman David

2a

2b

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 55 CR 110)

DOCKET ENTRIES

2-25-55	Filed Indictment (2) (JS-2)	15 00 U.S.
2-25-55	Enter order to issue bench warrant and fix bond at $500.00—Barnes, J.	
2-25-55	Issued bench warrant with copy of Indictment.	mk
3-2-55	Filed appearance of attorney	

3-8-55	Filed appearance bond $500.00	s
3-8-55	Filed warrant retd exctd $2.00	s
3-18-55	Plea of not guilty entd. by deft. Leave to deft. to file any and all motions with brief in support thereof in 20 days—Govt's. opposing brief to be filed in 15 days—Reply brief 10 days thereafter —Disposition on said motions set for May 19, 1955—Campbell, J. Mld. notice to attys. 3-23-55	s
5-5-55	Lv file mo to suppress evid & brief in support thereof instr. Opposing brief to be filed in 15 days—reply brief 10 days thereafter—ruling on said motion reset from May 19, 1955 to June 7, 1955—Campbell, J.	
5-5-55	Filed notice	
5-5-55	Filed petition to suppress	(4)
5-5-55	Filed Memorandum brief	(6)
5-5-55	Mailed notices	s
5-23-55	Filed Govt's brief in supp of answer to deft's petn to suppress	
5-23-55	Filed notice	
5-23-55	Filed answer to petn to suppress evid	
6-6-55	Order deft's tm to file reply & reply brief extd 10 days and hrg on mo to suppress reset from June 7 to June 22, 1955—Campbell, J.	
6-6-55	Filed notice	
6-6-55	Mailed notices	s

6-20-55	Filed reply to Govt's answer to deft's petn to suppress (5)
6-17-55	On Court's mo cause transferred to Executive Committee for re-assignment according to the rules, Judge Campbell, when he was U.S. Atty, having prosecuted deft herein—Campbell, J.
6-17-25	Case reassigned to Judge Knoch (Draft)
6-27-55	Mailed notices s
9-12-55	Filed Notice, Motion and Affidavit (1)(1)(1)
9-12-55	Enter order motion of Govt to file inst. affidavit of Columbus Fletcher, Insp. Alcohol & Tobacco Tax Unit, U.S. Treas. Dept., granted—Hoffman, J. Mld ntcs 9-13-55 H
10-7-55	Order cause set for hrg of oral argts on deft's mo to suppress to Oct 21, 1955—Knoch, J.
10-10-55	Mailed notices s
10-21-55	On deft's mo cause cont'd to Nov 14, 1955 for hrg on mo suppress—Knoch, J.
10-24-55	Mailed notices s
11-14-55	On Gvt's mo cause reset to Dec 5, 1955 for hrg on deft's mo to suppress—Knoch, J.
11-15-55	Mailed notices s
12-5-55	Evid hrd & concl'd on deft's mo to suppress evid & cs taken under advst on brfs heretofore filed with lv to deft to file add'l brf within 10 days & Govt to reply within 5 days thereafter—Knoch, J.

12-6-55	Mailed notices	s
12-15-55	Order extend time for deft to file memorandum brief in support of motion to suppress to Dec 27, 1955 and pltff to reply in 10 days thereafter —Knoch, J.	
12-16-55	Mailed notices	s
1-9-56	Filed memorandum reply brief in support of mo to suppress evid	(21)
1-9-56	Order lv file brief in support of mo to suppress evid instr & lv pltff file reply brief in 15 days —Knoch, J.	
2c		
1-11-56	Mailed notices	s
1-20-56	Filed memorandum in answer to deft's reply brief	
1-20-56	Filed affidavit of mailing	
2-10-56	Pursuant to memorandum filed herewith order deft's petition to suppress evidence denied—Knoch, J.	
2-10-56	Filed memorandum	
2-13-56	Mailed notices with copies of memorandum	s
3-21-56	On mo Govt cs set for trial Apr 27, 1956—Knoch, J.	
3-22-56	Mld ntcs	s
4-26-56	Argmts hrd & concld on deft's mo for production of certain property at trial & said mo denied—on deft's mo cause reset for trial from Apr 27 to May 9, 1956—Knoch, J.	

4-26-56	Filed notice & motion
4-27-56	Mailed notices
5-3-56	On Court's motion ord cause reset from May 9 to May 25, 1956 for trial—Knoch, J.
5-3-56	Mailed notices
5-15-56	On Court's mo cause reset for trial from May 25 to June 7, 1956—Knoch, J.
5-15-56	Mailed notices
5-29-56	Ord cs reset from June 7 to June 27, 1956 for trial—Knoch, J.
5-31-56	Mailed ntcs
6-20-56	Cs reset for tr from June 27 to Sept. 14, 1956—Knoch, J.
6-20-56	Mld ntcs
9-12-56	On deft's mo cs reset for tr from Sept 14 to Sept 21, 1956—Knoch, J.
9-12-56	Mld ntcs
9-21-56	Cause called for trial—jury waiver approved & filed—parties stipulate that evid heretofore presented on mo to suppress evid should be submitted to Court together with fur stip between the parties as the evid on the question of guilt or innocence of deft. Both sides rest. Order deft's mo for judg of acquittal ent'd & denied. Court finds deft guilty & ord cs referred to Prob Dept for presentence investig—set dispn Oct 31, 1956—Knoch, J.
9-24-56	Mld ntcs

9-21-56	Filed Jury Waiver
9-21-56	Filed transcript of proceedings had before Judge Knoch on Dec. 5, 1955 (82)
10-31-56	On deft's motion order cause reset for dispsn to Nov. 19, 1956—Knoch, J. Mld ntcs 11-1-56 H
11-19-56	On finding of guilty heretofore entd order deft committed to custody of Atty Gen. for period 2 years. On deft's motion order execution of sentence stayed until Dec. 17, 1956, 12:00 noon, at which time deft shall surrender to U.S. Marshal. Order stay bond fixed in sum of $3,000.00 —Draft—Knoch, J. J S—3. Mld ntcs 11-20-56
11-20-56	Issued 2 c. c. of commitment to U.S. Marshal H
11-19-56	Filed App. Bond—$3,000.00 H
11-27-56	Filed Notice (1)
11-27-56	Order bond on Appeal fixed in amount of $3000.00 —Knoch, J. Mailed Notice to Attys. 11-28-56
11-28-56	Filed Notice of Appeal of defendant-appellant (2) 5.00 Pd
11-28-56	Filed Appeal Bond (2)
11-28-56	Mailed copy of Notice of Appeal to U.S. Atty., U.S. Marshal and copy with statement of docket entries to U.S.C.A. 7th Circuit B

2d

United States of America
Northern District of Illinois—ss:

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full copy of the original Docket entries to and including November 28, 1956, in the cause entitled: United States of America, Plaintiff *vs.* Herman David, defendant, No. 55 CR 110, now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereto subscribed my name and affixed the seal of the aforesaid
(Seal) Court at Chicago, Illinois this 28th day of November, A.D. 1956.

Roy H. Johnson
Clerk.
By Gizella Butcher
Deputy Clerk.

3 PLEAS had at a regular term of the United States District Court for the Eastern Division of the Northern District of Illinois begun and held in the United States Court Rooms in the City of Chicago in the Division and District aforesaid on the first Monday of November, being the 5th day thereof, in the Year of Our Lord One Thousand Nine Hundred Fifty-Six and of the Independence of the United States of America, the 181st Year.

Present:

Honorable John P. Barnes, Chief District Judge
Honorable William H. Holly, District Judge
Honorable Philip L. Sullivan, District Judge
Honorable Michael L. Igoe, District Judge
Honorable William J. Campbell, District Judge
Honorable Walter J. La Buy, District Judge
Honorable J. Sam Perry, District Judge
Honorable Win G. Knoch, District Judge
Honorable Julius J. Hoffman, District Judge
Roy H. Johnson, Clerk
William W. Kipp, Sr., Marshal

Monday, November 19, 1956

Court met pursuant to adjournment

Present: Honorable Win G. Knoch, Trial Judge

4

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

The February 1955 Grand Jury charges:

On or about November 20, 1953, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division,

HERMAN DAVID,

the defendant herein, did unlawfully, knowingly, willfully and feloniously have in his possession five (5) gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed upon such spirits, as required by law; all in violation of Section 2803(a), Title 26, United States Code.

5

COUNT TWO

The February 1955 Grand Jury further charges:

On or about November 20, 1953, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the said defendant,

HERMAN DAVID,

did unlawfully and willfully remove, deposit and conceal certain goods and commodities, to wit, five (5) gallons of distilled spirits, for and in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax; all in violation of Section 3321(a), Title 26, United States Code.

A True Bill:
Charles S. Netzorg
Foreman

/s/ R. Tieken
United States Attorney

7

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

Friday, March 18, 1955

Present: Honorable William J. Campbell, District Judge

This day come the United States by the United States Attorney comes also the defendant Herman David in his own proper person and by his counsel and being arraigned upon the Indictment filed herein against him pleads not guilty thereto and it is

Ordered that leave be and is hereby given to the defendant to file any and all motions with brief in support thereof in 20 days that the Government's opposing brief shall be filed in 15 days that reply brief shall be filed 10 days thereafter and that disposition on said motions be and the same is hereby set for May 19, 1955

8

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

Thursday, May 5, 1955

Present: Honorable William J. Campbell, District Judge

On motion of the defendant Herman David by his counsel it is

Ordered that leave be and is hereby given to the defendant to file motion to suppress evidence and brief in support thereof, instanter, that opposing brief shall be filed in 15 days that reply brief shall be filed 10 days thereafter and that ruling on said motion be and the same is hereby reset from May 19, 1955 to June 7, 1955

10

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 55 CR 110)

PETITION TO SUPPRESS EVIDENCE

To The Honorable William J. Campbell,
Judge of said Court:

1. Your petitioner, Herman David, respectfully represents unto your honor that he is the defendant in the above entitled cause; he further represents as follows: That the indictment in the above entitled cause consists of two counts; in the first count your petition is charged that on November 20, 1953, in the Northern District of Illinois, Eastern Division, he did unlawfully have in his possession five gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein; in count two of said indictment, your petitioner is charged that on November 20, 1953, he unlawfully removed, deposited and concealed five gallons of distilled spirits, in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax.

11 2. On November 20, 1953, while he was seated in an automobile, owned by him, on the south side of East 45th Street just west of the corner of 45th Street and South Vincennes Avenue in the City of Chicago, Illinois, two agents, Fred D. Roseboro and Carl Hanbach, employees of the Alcohol Tax Unit, a branch of the Treasury Department of the United States of America, placed your petitioner under arrest and took him into custody and searched the said automobile and found therein three one gallon glass jugs containing alcohol that were in a shopping bag, and two one gallon glass jugs containing alcohol,

which were in another shopping bag. Both of these shopping bags were in the back of the automobile on the floor thereof between the back seat of the automobile and the front seat thereof.

3. At the said time and place the said jugs of alcohol were possessed by and owned by your petitioner.

4. At the time that your petitioner was seized and taken into custody, the aforesaid agents did not have a warrant for his arrest, nor a search warrant to search either him nor the aforesaid automobile, or any process of any kind, or any authority of any law.

5. The said arrest of your petitioner by the said agents was illegal and the search made by the said agents was illegal, in that, the said search and seizure of the said jugs and alcohol was not made pursuant to and incidental to a lawful arrest, and the said seizure of the said
12 jugs and the said five gallons of alcohol was unlawful, and both the search and seizure were in violation of the 4th and 5th Amendments of the Constitution of the United States of America.

6. Your petitioner is informed and believes, and based upon such information and belief so states the fact to be that there was no sufficient knowledge of facts or circumstances to justify a man of prudence and caution to believe that a violation of the laws of the United States of America was then and there being violated, and your petitioner is informed and believes that the said United States of America, Plaintiff, expects to use said illegally seized property as a result of the said illegal search together with everything procured by said plaintiff as the result of information and clues procured from the said search and seizure against your petitioner on a trial of the above entitled cause.

7. Your petitioner further represents that the use and evidence against your petitioner on the trial of the above entitled cause of the property described, to-wit: five gallons of alcohol, or any part thereof, and the use of any and all evidence obtained by the United States of America as a result of information and clues from the said unlawful search and seizure is in violation of the rights of your petitioner under the 4th and 5th Amendments to the Constitution of the United States.

Wherefore, your petitioner prays that an order may be entered herein by this Honorable Court directing that
13 the use and evidence by the United States of America, Plaintiff, its attorneys, agents and representatives, of the said property, to-wit: five gallons of alcohol, five glass jugs, and two shopping bags, or any part thereof, against your petitioner in the above entitled cause be suppressed, together with all evidence secured as result of information and clues obtained as result of the said illegal search and seizure of and from your petitioner of the said property.

Herman David

State of Illinois
County of Cook—ss:

Herman David, being first duly sworn, on oath deposes and says that he has read the above and foregoing Petition by him subscribed, and that the same is true in substance and in fact, except such matters as are therein stated to be on information and belief, and as to such matters, he believes them to be true.

Herman David

Subscribed and sworn to
before me this 2nd day
of May, A.D. 1955.
Ruth Rosenbaum
Notary Public
(Seal)

14

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

ANSWER TO PETITION TO SUPPRESS EVIDENCE

Now comes the United States of America by R. Tieken, United States Attorney for the Northern District of Illinois, and in answer to the defendant's Petition to Suppress Evidence does represent to this Honorable Court as follows:

1. That on November 20, 1953, the defendant was arrested for the offenses charged in the indictment; that prior to the defendant's arrest probable cause existed to cause Agents of the Alcohol and Tobacco Tax Division of the United States Treasury Department to believe that the automobile occupied by and in possession of the defendant contained distilled spirits possessed in violation of law;

2. That the Agents of the Alcohol and Tobacco Tax Division of the United States Treasury Department, who arrested the defendant on November 20, 1953, had received information from a hitherto reliable source that one Herman David was transporting and delivering tax unpaid distilled spirits to various speakeasies on the south
15 side of Chicago, and particularly to one located at 4502 South Vincennes Avenue, Chicago, Illinois; that the defendant was making deliveries in a black Packard sedan; that the defendant's past conduct was well known to the aforesaid Agents, having been convicted in the case of *United States* v. *David*, 107 F. 2d 519 (CA7 1939);

3. That on November 6, 1953, the aforesaid Agents saw the defendant leave his home at Dalton, Illinois, in the

above-described automobile and followed him to Forty-Fifth Street, near Vincennes Avenue, where he was seen to carry two full shopping bags into the building housing a known speakeasy;

4. That on November 20, 1953, at 10:30 A.M., the aforesaid Agents saw the defendant *park* a black Packard sedan near the south curb of Forty-Fifth Street, west of the intersection of Vincennes Avenue and in the immediate vicinity of the aforesaid speakeasy; that the aforesaid Agents approached the car of the defendant and observed two paper bags identical in appearance to the bags previously seen in possesion of the defendant; that the tops of one-gallon glass jugs were plainly visible in the rear of the car; that the defendant was arrested and the distilled spirits referred to in the Petition to Suppress Evidence herein were taken from the defendant's possession;

Wherefore the United States of America respectfully represents unto the Court that, on the basis of the foregoing facts and circumstances, probable cause to search
16 the automobile of the defendant on November 20, 1953, existed at the time the search was made and that defendant's Petition to Suppress Evidence is neither supported by law nor fact, and, accordingly, should be denied.

R. Tieken
R. Tieken
United States Attorney

17 State of Illinois
County of Cook—ss

Carl G. Hambach, being first duly sworn, on oath deposes and says that he has read the foregoing Answer to the Defendant's Petition to Suppress Evidence, and that he knows and verily believes the same to be true in substance and in fact, except such matters as are therein stated to be on information and belief, and as to such matters he believes them to be true.

Carl G. Hambach
Carl G. Hambach, Investigator
Alcohol and Tobacco Tax Division, United States Treasury Department

Fred D. Roseboro, being first duly sworn, on oath deposes and says that he has read the foregoing Answer to the Defendant's Petition to Suppress Evidence, and that he knows and verily believes the same to be true in substance and in fact, except such matters as are therein stated to be on information and belief, and as to such matters he believes them to be true.

Fred D. Roseboro
Fred D. Roseboro, Investigator
Alcohol and Tobacco Tax Division, United States Treasury Department

Subscribed and sworn to before me
this 23rd day of May, A.D. 1955.
Ruth I. Quinlan
Notary Public
(Seal)

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

REPLY TO GOVERNMENT'S ANSWER TO DEFENDANT'S PETITION TO SUPPRESS EVIDENCE.

To The Honorable William J. Campbell,
Judge of said Court:

Now comes Herman David, by Myer H. Gladstone, his attorney, and replying to the Government's Answer to his Petition to suppress evidence, says:

1. He admits that on November 20, 1953, he was arrested by Agents of the Government. He denies that prior to his arrest probable cause existed to cause the Agents who arrested him on said date, Carl G. Hambach and Fred D. Roseboro, to believe that the automobile occupied by and in possession of the defendant contained distilled spirits possessed in violation of law.

2. He denies that the aforesaid Agents had received any information from what is labeled "a hitherto reliable source" that he was transporting and delivering tax unpaid distilled spirits to various speakeasies on the
19 south side of Chicago, and particularly to one located at 4502 South Vincennes Avenue, Chicago, Illinois.

3. He denies that on November 6, 1953, the said Agents saw him leave his home at Dolton, Illinois, in a black Packard sedan, and that they followed him to 45th Street, near Vincennes Avenue, where he was seen to carry two full shopping bags into the building housing a known speakeasy.

4. Both of the aforesaid Agents, Carl G. Hambach and Fred D. Roseboro, testified before the Honorable C. S. Bentley Pike, United States Commissioner for the Northern District of Illinois, Eastern Division, on Friday, July 9, 1954, in the case of United States *v.* Herman David. At

said time and occasion, the said Agents were sworn to tell the truth by the aforesaid Commissioner. The said Fred D. Roseboro testified at said time and place that he couldn't say how many times during the month of November 1953 he saw the defendant; he testified that he saw the defendant on November 20, 1953, but didn't keep a record of the times subsequent to said date. He testified further that he saw the defendant driving in an easterly direction on 45th Street and parking his Packard automobile on the south side of East 45th Street just west of South Vincennes Avenue, in the City of Chicago. At that time all he could see in the back of the automobile were the necks of two glass jugs; that he took two shopping bags from the back of the said automobile, one containing three one-gallon glass jugs and the other containing two one-gallon glass jugs. He unscrewed the tops of the jugs and dipped his finger into the liquid, tasted it and smelled the contents, and decided that the jugs contained distilled spirits.

20 5. He testified further that he didn't know where those shopping bags were on the aforesaid date of his testimony, and that they were the average paper shopping bags, two or three being stuffed in each other to make them stronger. These bags were about two feet high. The diameter of each jug was about eight inches, and each of them was about twelve inches high. The bags were resting on the floor of the automobile. The neck of each jug was about a couple of inches long, and the diameter about an inch and a half. He didn't know where those jugs were on the aforesaid date of his testimony, nor whether or not they had handles on them. He further testified that the jugs were destroyed. When he looked at the jugs he could see the tops of the necks of the jugs. He had no reason to believe it was spirits except that he had previous information from a reliable source that the defendant was delivering spirits to this address.

6. On further cross examination, he testified that "we got confidential information from various sources" and that he didn't say "we had confidental information." The said Fred D. Roseboro refused to answer, on cross examination, the source from whom he received the information that Mr. David was making delivery to the speakeasy, on the ground that it was against public policy. The witness did not know the defendant, only by reputation. He heard from other investigators in his office that the defendant has a reputation of being a bootlegger. He testified that he had never seen the defendant before, and hence this defendant says that the said Fred D. Roseboro did not see this defendant on November 6, 1953, as alleged in Paragraph 3 of the Government's Answer.

21 7. The said Carl G. Hambach testified under oath before the aforesaid Commissioner on July 9, 1954, and at the said time he testified that he saw the defendant on November 6, 1953, at the defendant's home, 14823 Grant Street, Dolton, Illinois; they had been keeping his home under surveillance for a period of a month or more previous to November 6, 1953, and up to November 20, 1953. He testified that on November 6, 1953, at 7:50 A.M. the defendant drove his car from the south side of his house to a basement garage, at 8:10 A.M. He followed David's Packard to the vicinity of 45th Street and Vincennes Avenue. He did not see David put anything in his car, nor did he see any shopping bags on that occasion. After he saw David go to 45th and Vincennes, he dropped out of the picture from then on, until November 20, 1953. On this occasion, November 6, 1953, the defendant was accompanied by a lady and a Boxer dog.

8. Neither of the aforesaid Agents saw any shopping bags in the possession of the defendant previous to November 20, 1953.

Wherefore, in view of the foregoing allegations, which are in contradiction of those in the Government's Answer, the defendant prays that a hearing be had on his Petition to suppress the evidence described therein.

Herman David, Defendant
By /s/ Myer H. Gladstone
His Attorney

Myer H. Gladstone
134 North LaSalle Street
Chicago 2, Illinois
STate 2-3950
Attorney for Defendant

22 State of Illinois
County of Cook—ss

Herman David, being first duly sworn, on oath deposes and says that he has read his foregoing Reply to the Answer of the Government to the Defendant's Petition to suppress evidence, that he knows the contents thereof, and that the same are true.

Herman David
Defendant

Subscribed and sworn to before
me this 20th day of June, A.D.
Ruth Rosenbaum
Notary Public
(Seal)

Received a copy of the foregoing Reply this 20th day of June, A.D. 1955.

William T. Hart
Asst. U. S. Atty N. D. of Illinois

23

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 55 CR 110) * *

Monday, September 12, 1955

Present: Honorable Julius J. Hoffman, District Judge

On motion of the Government by the United States Attorney it is

Ordered that leave be and is hereby given to file, instanter, Affidavit of Columbus Fletcher, Inspector, Alcohol and Tobacco Tax Unit, United States Treasury Department, in the above entitled case

24

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 55 CR 110) * *

MEMORANDUM AND ORDER

This matter came on to be heard on defendant's petition to suppress evidence five gallons of alcohol, five glass jugs, and two shopping bags.

The Court has heard the testimony of witnesses which has been transcribed by the Court Reporter, has had the benefit of argument of counsel on briefs, and is fully advised in the premises.

The primary question here is whether or not the items sought to be suppressed were obtained in the course of a search, which although made without search warrant, was nevertheless lawful.

The evidence indicated that the items were seized after search of an automobile. Government witnesses, officers of the Alcohol Tax Division, testified that they had received information to the effect that petitioner, known to them to have been convicted of a similar offense in the past, was transporting tax unpaid alcohol; that they con-

ducted surveillance at various times; that they followed petitioner from his home to the vicinity of a known "speakeasy;" that on one occasion he entered the building in which the known speakeasy was located, carrying two shopping bags, the contents of which were not described, and shortly emerged carrying the same bags, then empty; that on the occasion of the search, they observed him again visit this vicinity, and watched him park his car before he was approached by anybody.

There were several conflicts in the testimony. Petitioner stated that he was placed under arrest prior to search of his automobile and that the two shopping bags on the floor of the rear of his automobile, in which the five gallon jugs of alcohol were carried, extended eight or ten inches above the necks of the bottles, which in turn were covered with paper and could not be seen from outside the automobile.

The officers testified that officer Roseboro made the search and officer Hambach then made the arrest. Both officers said that the necks of the jugs and their colorless fluid contents were clearly visible to them when they looked through the windows of the automobile. The Court found their testimony credible.

25 Petitioner stated that on the occasion of the search, he had parked his automobile in that vicinity only in order to examine it for possible damage to the tires, but that he was prevented from doing so by the arrival of an officer.

After careful weighing of all of the evidence, this Court is of the opinion that the facts and circumstances within the knowledge of the searching officer did furnish basis for a reasonable belief that the searched automobile did contain tax unpaid alcohol, and that the search was lawful.

The petition to suppress must, therefore, be, and it is hereby, denied.

Win G. Knoch
United States District Judge

Date: Feb. 10 1956

26

In the United States District Court
• • (Caption—No. 55 CR 110) • •

Friday, September 21, 1956

Present: Honorable Win G. Knoch, District Judge

This cause being called for trial comes the United States by the United States Attorney comes also the defendant Herman David in his own proper person and by his counsel and being informed by the Court of his right to a trial by Jury waives a Jury trial in writing with the approval of the Court and consent of the Government and by stipulation of the parties herein it is

Ordered that evidence heretofore presented on motion to suppress evidence shall be submitted to the Court together with further stipulation between the parties as the evidence on the question of the guilt or innocence of the defendant; both sides rest and the defendant by his counsel enters his motion for judgment of acquittal and the Court being fully advised it is

Further Ordered that said motion be and the same is hereby denied and the Court being fully advised in
27 the premises finds the defendant guilty as charged in the Indictment filed herein against him and it is

Further Ordered that this cause be and the same is hereby referred to the Probation Department of this Court for a presentence investigation and set for disposition on October 31, 1956

29

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 55 CR 110)

TRANSCRIPT OF PROCEEDINGS

had in the above-entitled cause before the Honorable Win G. Knoch, one of the Judges of said Court, in his Court Room in the United States Court House, Chicago, Illinois, on Friday, September 21st, 1956, commencing at 10:30 o'clock a.m.

Present:

Hon. Robert Tieken, United States Attorney, Northern District of Illinois, Eastern Division, by
Mr. Joseph E. Tobin, Assistant United States Attorney,
appeared for the United States of America;
Mr. Myer H. Gladstone, (Suite 506, 134 North La Salle Street, Chicago, Illinois),
appeared for the Defendant.

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30 The Clerk: 55-CR-110, United States of America *vs.* Herman David, for trial.

Mr. Gladstone: Good morning, your Honor.

Mr. Tobin: Good morning.

Mr. Gladstone: Your Honor, could Mr. Tobin and I discuss this case in chambers with you?

The Court: Is that your desire?

Mr. Gladstone: Well, there is something in which I am personally involved that I do not want to talk about here. I am ready to go to trial.

The Court: Has the Government any objection?

Mr. Tobin: No; no objection.

The Court: We will do it then:

(There was a short cess, during which there was a discussion between counsel and the Court in chambers, after which the following further proceedings were had herein, in open Court, to-wit:)

The Clerk: The case on trial.

The Court: The record may show that a Jury waiver has been executed. Is that correct, gentlemen?

31 Mr. Gladstone: That is right.

Mr. Tobin: Yes.

The Court: You may proceed.

Mr. Gladstone: Your Honor, if it is satisfactory with the Court and with Mr. Tobin, the Defendant is willing to submit the case on the evidence that was before your Honor, that was presented to your Honor on the motion to suppress, with the understanding that the Defendant's objections to the evidence we sought to have suppressed stand as objections on this trial, and that will save your Honor and all of us four or five hours' time because there will not be any different evidence, in my opinion.

We are willing to do that if it is satisfactory to Mr. Tobin.

Mr. Tobin: May I have just a moment? I did not try the motion, your Honor.

(There was a short suspension, after which the following further proceedings were had herein, in open Court, to-wit:)

Mr. Tobin: I am informed by the Agent that there
32 would be no additional evidence introduced in the trial of the case; that the testimony would be the same as was presented on the hearing on the motion to suppress.

Mr. Gladstone: I can't see that there would be any difference.

Mr. Tobin: The only thing that bothers me is whether or not it was proved at that time that the contents were alcohol.

Mr. Gladstone: There was proof. I will show it to you in the record. I will stipulate with you, in fact, that the contents were alcohol subject to my objection.

The Court: Well, I have a pretty fair recollection of the evidence on the motion to suppress.

Mr. Gladstone: I have the typewritten record here, your Honor.

The Court: You have?

Mr. Gladstone: Yes. I think there has been one filed in the Clerk's Office too.

Mr. Tobin: Was it also brought out that the containers bore no Internal Revenue stamp?

Mr. Gladstone: What?

33 Mr. Tobin: Was it also brought out that the containers bore no Internal Revenue stamp?

Mr. Gladstone: Yes. Venue was brought out. This was heard before Judge Knoch.

Venue was brought out. This question was asked:

"Q. Directing your attention to on or about November 20th, 1953, were you in the neighborhood of 45th and Vincennes Avenue, Chicago, Illinois?"

The venue was brought out. If you would like to see this, it would only take five or ten minutes to look at it, and I can point out the other things you may be concerned with.

The Court: Suppose we take a short recess, and you may examine the record and then if it is agreeable you can submit the case on that record.

Mr. Gladstone: Subject to my renewed objections, of course.

The Court: Yes. If you are able to come to such an agreement I will then review the record and give you an early decision, gentlemen. We will declare a recess now, and you may determine whether there is any addi-
34 tional proof to be presented.

Mr. Gladstone: I have only one more motion in addition to this, and that is a motion for a judgment of acquittal.

The Court: All right.

(Whereupon a short recess was taken, at which the following further proceedings were had herein, in open Court, to-wit:)

The Clerk: The case on trial.

Mr. Tobin: If your Honor please. I have examined the transcript which Mr. Gladstone has presented rather hurriedly. I notice that the Witnesses for the Government in testifying on the motion said they knew the Defendant, Herman David, but they did not point him out in the Court Room.

I suggest to counsel that it should be stipulated that the Witnesses would identify Herman David as the Defendant in this case.

Mr. Gladstone: We will so stipulate, your Honor, although the record shows that Herman David took the stand. He was the first witness who took the stand.

35 The Court: All right.

Mr. Gladstone: I do not think there is any question of identification, but we will stipulate to that, your Honor.

Mr. Tobin: There is another point I noticed in looking over this transcript. They did not introduce in evidence the composite sample with respect to which Agent Fletcher testified. As I recall, he testified that he took—I believe it was a pint bottle, and he made a composite

sample from the five jugs found in the car; that he sealed it and placed the Defendant's name and numbers on it; and that he turned that over to the chemist for analysis.

While there is some testimony at the hearing that Agent Roseboro examined the contents of these jugs by smell and by taste and testified it was distilled spirits of alcohol, the chemist did not testify. Counsel has stated that he would stipulate to the testimony of the chemist, that he received this bottle which would be marked Exhibit 1 from Agent Fletcher; that he analyzed the contents; and that his analysis showed the contents to be uncolored
36 distilled spirits of alcohol, 163.3 proof.

Mr. Gladstone: I will stipulate that if he were present as a witness he would so testify subject, however, to my necessary objection that the evidence is inadmissible because of what we claim is an illegal search and seizure, so that anything found as a result of that, of course, would be inadmissible. That is what we sought to suppress, your Honor.

The Court: Yes.

Mr. Gladstone: Subject to that objection we will stipulate that if Investigator Fletcher were present he would so testify.

Mr. Tobin: The chemist, you mean.

Mr. Gladstone: Or the chemist, rather, not Fletcher.

The Court: Very well.

Mr. Gladstone: I think, your Honor, that requires a ruling on your part.

The Court: Well, the objection is overruled and the evidence as stipulated will be admitted into evidence.

(The testimony presented on the motion to suppress was thereupon received in evidence.)

37 Mr. Tobin: While the Defendant David testified that 45th and Vincennes was in Chicago, the Agent—and also 45th and South Park Avenue—did not testify it was in Chicago, Illinois. I think that should be covered.

Mr. Gladstone: We will stipulate, your Honor, that if the Agents who are present today to testify and who would have testified, except for the submission of this case on the record heretofore made before your Honor, had testified, they would respectively testify that this happened in the City of Chicago, State of Illinois, Northern District of Illinois, Eastern Division.

Mr. Tobin: With the exception, of course, that the watching of his residence was in Dolton, Illinois, but in the Northern District of Illinois.

Mr. Gladstone: We will further stipulate that Mr. David's residence at Dolton, Illinois is in the Northern District of Illinois, Eastern Division.

Mr. Tobin: All right.

The Court: All right. Is that all, gentlemen?

38 Mr. Tobin: Yes.

Mr. Gladstone: That is all the evidence that will be presented at this hearing. I do, however, want to make a motion for a judgment of acquittal.

The Court: Well, I have had an opportunity to examine the transcript this morning while counsel were in conference, and I have heretofore ruled on the matter of the suppression of the evidence.

I am of the opinion that the motion made by counsel at this time should be denied, and I am going to find the Defendant guilty of the charge of the indictment.

I am going to order a pre-sentence investigation and the matter will be continued for final disposition until Wednesday, October 31st, at ten o'clock a.m.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

39

IN THE UNITED STATES DISTRICT COURT
• • (Caption—No. 55 CR 110) • •

CERTIFICATE

I Hereby Certify that I reported in shorthand the proceedings had in the above-entitled cause on Friday, September 21st, 1956, before the Honorable Win G. Knoch, and that the foregoing typewritten transcript consisting of pages 1 to 10, both inclusive, is a true, correct and complete transcript of my Official Shorthand Notes so taken as aforesaid.

/s/ Claude W. Youker, Jr.
Official Reporter, United States District Court, Northern District of Illinois, Eastern Division.

42

IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—No. 55 CR 110) • •

TRANSCRIPT OF PROCEEDINGS

had and testimony taken in the above-entitled cause before the Honorable Win G. Knoch, one of the Judges of said Court, in his Court Room in the United States Court House, Chicago, Illinois, on Monday, December 5, 1955, commencing at 10:25 o'clock a.m.

Present:

Hon. Robert Tieken, United States Attorney, Northern District of Illinois, Eastern Division, by

Mr. William T. Hart,

Assistant United States Attorney,

appeared for the United States of America;

Mr. Myer H. Gladstone (Suite 506, 134 North La Salle Street, Chicago, Illinois),

appeared for the Defendant.

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43 The Clerk: 55-CR-110, United States of America, *vs.* Herman David, for hearing on Defendant's motion to suppress, and so forth.

Mr. Tobin: This is Mr. Hart's case. The Government is ready for trial, but he is appearing before Judge Perry at this time. May we hold it?

The Court: We will hold it on the call, yes.

(Whereupon the Court gave attention to other matters on the call, after which the following further proceedings were had herein, to-wit:)

The Clerk: 55-CR-110, United States of America, *vs.* Herman David, for hearing on Defendant's motion to suppress, and so forth.

Mr. Gladstone: Your Honor, the matter before the Court is a motion to suppress evidence. There have been certain pleadings filed and briefs filed and after the Defendant's brief was filed and the Government's brief was filed, it looked as if the matter required evidence, so I have brought Mr. David here to take the stand, and after he testifies I would then like to file a reply brief, if it becomes necessary.

Mr. Hart: Well, perhaps your Honor can consider
44 that at the close of the hearing, and then we can reply appropriately to that suggestion.

The Court: All right. You may proceed to put on your evidence, sir.

Mr. Gladstone: Mr. David, will you take the stand up there, please.

(The witness was thereupon duly sworn.)

(And Thereupon the Petitioner, to maintain the issues on his behalf, introduced the following evidence, to-wit:)

HERMAN DAVID, the Petitioner herein, called as a witness on his own behalf, having been first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Gladstone:

Q. What is your name?

A. Herman David.

Q. Herman David?

A. Yes.

Q. Where do you live?

A. 14823 Grant Street.

Q. Directing your attention to on or about November 20, 1953, were you in the neighborhood of 45th and Vincennes Avenue, Chicago, Illinois?

45 A. Yes, sir.

Q. About what time of the day were you in that neighborhood?

A. Oh, around about ten-thirty a.m.

Q. What did you do? Were you in an automobile?

A. Yes, sir.

Q. What did you do in that neighborhood?

A. I was going east.

Q. On what street?

A. On 45th Street.

Q. Yes.

A. Between South Park and Vincennes, when my car felt like something was going wrong, or getting a flat tire or something, you know.

Q. Yes.

A. Either it could have been the street or my tire, so I thought I'd pull over to find out the cause of this car to sway a little bit, and a man came up to me and he told me that—

Q. Were you parked at that time?

A. What is it?

Q. Were you parked at that time?

A. Oh, yes. I just pulled over to one side of the street and a man came up to me and he told me if my name
46 was Herman David and I said, "Yes, sir." He said, "You're under arrest", so from there on he took me—

Q. Just a minute.

A. Yes.

Q. At that time did he have a warrant of arrest in his possession—

A. No, sir.

Q. —that he exhibited to you?

A. No.

Q. Did he have a search warrant in his possession?

A. He didn't have anything.

Q. Or any other legal document that he exhibited to you?

A. No, he didn't.

Q. After he told you that you were under arrest, what did he do?

A. Well, he took me in custody.

Q What did he do after that?

A. (No answer.)

Q. You say he took you in custody. He said, "You're under arrest", and then what did he do?

A. What did he do?

Q. Yes.

A. Well, he evidently had somebody with him and
47 one fellow got in the car, and that's the only thing I seen.

Q. Now, did you have anything in the back of the car?

A. Yes, sir.

Q. What did you have in the back of the car?

A. I had five one-gallon jugs.

Q. What did they contain?

A. They contained spirit.

Q. How large were the jugs? How high were the jugs?

A. Oh, I don't know. They were about eleven inches high, somewhere in there, as best I recollect.

Q. Were they exposed to view?

A. Oh, no. They were in the bag.

Q. In what kind of bags?

A. They were placed in bags, and then they were in the carry-all bag.

Q. How high was the top of that bag over and above the top of the bottles or jugs?

A. Oh, I'd say about eight or ten inches.

Q. Eight or ten inches above that?

A. Yes.

Q. Was there anything on top of the bottles?

A. There was paper on top of the bottles there.

48 Q. Was anything visible—

A. No.

Q. (Continuing) —to anybody who might look into those bags at that time?

A. No.

Q. I beg your pardon?

A. No, it wasn't.

Q. Now, how high were the necks of the bottles?

A. (No answer.)

Q. Do you know what I mean by the necks of the bottles?

A. Well—

Q. The straight portion of the body of the bottle.

A. I imagine about a couple of inches, or something.

Q. About two inches.

A. Yes.

Mr. Gladstone: That is all.

Mr. Hart: Mr. David—

Mr. Gladstone: Just a minute, please.

By Mr. Gladstone:

Q. By the way, did they take those bottles and bags in custody?

A. I imagine.

Q. Did they take them?

49 A. I don't know.

Q. But they took the automobile away from you?

A. They took the automobile.

Q. And everything else that was in the automobile, they took?

A. Yes, sir.

Q. In other words, you didn't take the bottles back with you?

A. No, I didn't.

Mr. Gladstone: That is all.

Cross Examination

By Mr. Hart:

Q. Mr. David, what did you say that address was?

A. 14823 Grant Street.

Q. That is where you were arrested, is that right?

A. What?

Q. Is that where you were arrested?

A. No, no.

Q. Where were you arrested?

A. I was arrested on 45th Street near Vincennes Avenue.

Q. You say that at the time you were arrested your car was parked, is that right, sir?

A. I just parked the car.

50 Q. You just parked the car?

A. Yes.

Q. You had a flat tire there, is that right?

A. No. I didn't say I had a flat tire. I was going to investigate, because my car was swaying a little bit. It could have been that.

When I discovered it, it could have been the street and it could have been the car, but I didn't have a chance to find out, because this man approached me as I stopped—

Q. Just answer my question. Did you have a flat tire? As a matter of fact, did you?

A. I don't know if I did or not. I didn't have a chance to examine my car.

Mr. Gladstone: I object to that. He did not say he had a flat tire.

By Mr. Hart:

Q. These one-gallon jugs were in shopping bags, is that right, sir?

A. That's right.

Q. One shopping bag?

A. There was two shopping bags.

Q. Two shopping bags?

A. Yes.

51 Q. Five one-gallon jugs, is that right?

A. That's right.

Q. What kind of a car were you driving on that occasion, sir?

A. I was driving a 1937 Packard four-door.

Q. That was a four-door automobile, is that right?

A. That's right.

Q. Now, at the time that the investigator came up to your car how long had you been parked near the curb?

A. I just parked. I just was going to come out of the car. I was just going to—I was just stopped, and I was just coming out of the car to investigate the nature of the car when it was swaying.

Q. You were getting out of the car?

A. I was just about to get out of the car when the man approached me.

Q. But you had not gotten out of the car?

A. Not yet.

Q. Now, as a matter of fact, Mr. David, you were about to make a delivery of five gallons of alcohol to 4502 South Vincennes Avenue, isn't that right?

Mr. Gladstone: Just one moment. I object to that question.

52 Mr. Hart: The question here is establishing probable cause for the arrest. I think it is proper to—

Mr. Gladstone: Probable cause can only be in the minds of the arresting Officers.

Mr. Hart: Well, that is part of our evidence, to show that it was about to take place. I think it is a proper question here. He has testified—

The Court: He has already testified as to what it was.

Mr. Hart: He has testified he was about to inspect his automobile for the purpose of ascertaining whether or not he had a flat tire. I am trying to show that is not the fact in this case.

The Court: He may answer.

Mr. Hart: Will you read the question to the witness, please, Mr. Reporter.

Q. (Read by the Reporter.)

A. No, sir.

By Mr. Hart:

Q. Mr. David, you have previously been convicted of violating the alcohol tax laws, is that not correct?

Mr. Gladstone: I object to that, your Honor.

Mr. Hart: As a witness on the stand, there is a
53 conviction that stands in this Court. He is testifying here as a witness and his credibility, of course, comes into play as any witness' testimony comes into play.

Mr. Gladstone: If there was a 1939 conviction it is not involved in this case, and the law so says.

The Court: Objection sustained.

Mr. Hart: No further questions.

Mr. Gladstone: That is all.

(Witness excused.)

Mr. Gladstone: That is all.

(Whereupon the Petitioner rested his case in chief on the motion to suppress.)

54. Mr. Hart: We have several witnesses to call in connection with this hearing, your Honor.

Mr. Gladstone: Not today, though.

Mr. Hart: Right now.

Mr. Gladstone: Why didn't you tell me that? I asked you whether you had these people here. I would have been on my way back to get my transcript, which I happen to have left at my office.

Mr. Hart: I told you when I walked into Court that I had witnesses to call.

Mr. Gladstone: Yes, but I asked you today.

Mr. Hart: They are outside now.

Mr. Gladstone: You said you had a matter and you should be over at the Court of Appeals.

Mr. Hart: Counsel, when we were standing right here (indicating) I told you I had several witnesses to call.

Mr. Gladstone: I have a transcript, your Honor, which I want to use for impeachment. I told counsel I had left that back at the office because I was upset about something, which made me forget to look for it, the transcript of a previous hearing.

The Court: We will recess for ten minutes so you can get it.

55 Mr. Gladstone: It will take me longer than ten minutes to go back to my office.

Mr. Hart: May I interpose?

The Court: Yes.

Mr. Hart: I have no purpose here to confuse you in any way, but I am sure I told you when I came into Court that I would have some witnesses.

At the same time, if it becomes material, perhaps we can take the testimony and I would even be willing to have your cross examination go over until a later time.

Mr. Gladstone: You are going to have two or three witnesses?

Mr. Hart: I believe it is the transcript before the Commissioner you are referring to, isn't that right?

Mr. Gladstone: That is right, which you had for a while.

Mr. Hart: Which you had prepared.

Mr. Gladstone: Yes.

Mr. Hart: Of course, this hearing is de novo. You will agree to that, won't you?

Mr. Gladstone: I know, but statements made even outside of a Court Room, or other extrajudical statements which may be impeaching are admissible.

Mr. Hart: I submit to the Court that the witnesses
56 will testify the same as they testified before the United States Commissioner, and that if any material variation comes up I will agree to have this case continued to another date.

Mr. Gladstone: Since then there has been a decision that has come down—I certainly didn't think you were going to put on all these witnesses.

Mr. Hart: Counsel, didn't you expect me to reply to the evidence here this morning?

Mr. Gladstone: Well, I was surprised you didn't have the men in here. I wanted to perhaps call one or two of them.

Mr. Hart: Have you subpoenaed them as your own witnesses?

Mr. Gladstone: No. I don't have to subpoena them as my own witnesses. As a matter of fact, in all the cases I have read—

The Court: We will recess for fifteen minutes.

Mr. Gladstone: I will run right over and get the transcript. It is at my office at 134 North La Salle Street.

The Court: All right. We will recess for fifteen minutes, and then we will proceed.

(Whereupon a recess was taken, after which the fol-
57 lowing further proceedings were had herein, to-wit:)

The Court: You may proceed.

Mr. Gladstone: Your Honor, I owe you an apology. After going over my file more carefully I found that I had the transcript in my file all the time.

The Court: All right, sir.

Mr. Hart: Whatever misunderstanding Mr. Gladstone may have had with respect to the Government calling witnesses today, if I have been responsible for that I apologize, sir.

Mr. Gladstone: You do not have to apologize, because—

Mr. Hart: If you had asked me I would have told you, sir.

Mr. Gladstone: Why don't you tell the Judge what I said about you right straight to your face? You can't read your tombstone when you are dead.

Mr. Hart: I did not want to mislead counsel.

Mr. Gladstone: Mr. Hart is a very fine young man, and I told him so. He tries his cases with the utmost sincerity and fairness. There is nothing he has done to me that requires an apology.

If there was anything at all, any difference of opin-
58 ion, it was really a misunderstanding probably on my part. Is that all right?

Mr. Hart: Thank you, sir.

The Court: You may proceed.

Mr. Hart: I will call Mr. Hambach of the Alcohol Tax Unit as the first witness, if the Court please.

(The witness was thereupon duly sworn.)

(And Thereupon the United States of America, to maintain the issues on its behalf, thereupon introduced the following evidence, to-wit:)

CARL G. HAMBACH, called as a witness on behalf of the United States of America, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Hart.

Q. Would you state your full name, sir, and will you please spell your last name for the Court Reporter?

A. Carl G. Hambach, H-a-m-b-a-c-h.

The Reporter: How do you spell your first name, please?

The Witness: C-a-r-l.

By Mr. Hart:

59 Q. Where do you live, Mr. Hambach?

A. 1622 North 77th Avenue, Elmwood Park, Illinois.

Q. What is your business, sir?

A. I am an investigator for the United States Treasury Department, Alcohol and Tobacco Tax Unit, Bureau of Internal Revenue.

Q. What are your duties in that capacity?

A. My duties are to try to locate violations of the Internal Revenue Laws pertaining to the manufacture, transportation and sale of illicit alcohol, and other duties.

Q. Do you know the Defendant in this case, Herman David?

A. I do.

Q. If he is present in the Court Room, will you point him out?

A. He is seated at that table over there (indicating).

Mr. Hart: Let the record show the witness identified the Defendant.

By Mr. Hart:

Q. Did you ever have occasion to make any investigation in connection with the Defendant?

A. Yes, I did.

60 Q. When did your investigation first begin?

A. Oh, in the latter part of February or the first part of March, 1953.

Q. Did you see the Defendant, Herman David, during the month of November, 1953?

A. I did.

Q. Will you state the dates on which you saw him, sir?

A. I saw him on several occasions. I saw him on the 6th of November—

Mr. Gladstone: I object to that as not responsive. He has directed his attention to November 20th.

Mr. Hart: No, sir. I think I asked him during the month of November, 1953.

Mr. Gladstone: All right.

A. I saw him the 6th of November, the 12th and the 13th of November, and on the 20th of November.

By Mr. Hart:

Q. Now, you have mentioned the 6th, the 12th, the 13th and the 20th of Nove ber?

A. Yes, sir.

Q. When you saw the Defendant on those occasions was it in connection with your investigation?

A. It was.

61 Q. Will you state what if anything transpired on November 6th in connection with the Defendant?

A. Yes. On November 6th I had Mr. David's home on Grant Street in Dolton, Illinois, under surveillance and at eight o'clock that morning—

Mr. Gladstone: Now, I object to that and ask that it be stricken, that he had it under surveillance.

Mr. Hart: Pardon me. I do not understand the basis for your objection, counsel.

Mr. Gladstone: Well, surveillance is not a definite fact.

Mr. Hart: Would you prefer him to say he was watching the house?

Mr. Gladstone: What?

Mr. Hart: Would you prefer him to say he was watching the house? Do you object to the word "surveillance"?

Mr. Gladstone: I certainly do.

By Mr. Hart:

Q. Were you watching the house?

A. I was watching the house, yes.

Q. Continue, please.

A. At about eight o'clock I saw the Defendant drive his Packard automobile, which bore license number

62 Illinois 2-199-850—

Mr. Gladstone: What was the license number?

The Witness: 2-199-850, I believe—out of the driveway that comes into Grant Street, and he drove it around to the first street south of Grant Street, east to the alley in back to the house, and then north in the alley to the driveway leading to another garage, and shortly thereafter he came out.

This time he was accompanied by a lady and a boxer dog. I followed him and he went east on Sibley Boulevard to the Expressway and north on the Expressway into Stony Island Avenue and then in through—I think that's Washington Park and into South Park Avenue, north on South Park to the intersection of 45th Street where he turned east, and I dropped him there at the intersection, and as I approached that vicinity I contacted investigator Fletcher over the radio—

Mr. Gladstone: I object to that, your Honor.

The Court: Objection sustained.

Mr. Hart: I think he may state what happened, your Honor, subject to materiality, the Government establishing materiality.

The Court: Proceed.

63 The Witness: I contacted Investigator Fletcher on the radio and told him—.

Mr. Hart: Do not state the conversation.

The Witness: All right.

By Mr. Hart:

Q. Merely state what happened.

A. I contacted Investigator Fletcher on the radio.

I again saw Mr. David around his home at Dolton on the 12th, and on the 13th we took the car and went into town and we lost him in town and didn't see where he went to.

Mr. Gladstone: A little louder, please.

The Witness: I say, I didn't see where he went to in town.

Mr. Gladstone: In the Loop?

The Witness: No. In Dolton, Illinois.

Mr. Gladstone: All right.

The Witness: Then on November 20th I was on one of the south drives of South Park Avenue, close to the intersection of 45th Street, and I saw Mr. David and his wife in this same Packard sedan come from the south on South Park Avenue and make a right turn and go east on 45th Street.

I got as close as I could behind him and when I
64 reached the intersection of 45th and—my goodness, I can't remember the name of the north and south street—45th and Vincennes Avenue, his car was parked at the curb just west of Vincennes Avenue and I saw Investigator Roseboro talking to him.

I pulled my car up alongside and got out. I saw Roseboro displaying his pocket commission—

Mr. Gladstone: What?

The Witness: I saw Investigator Roseboro displaying his pocket commission to Mr. David, and through the window I was able to see in the back of the car a paper bag that contained three one-gallon glass jugs. Roseboro had taken the cap off of one of them and tasted it, and he said, "It's alcohol", and I said to David, "You're under arrest. Get out of the car."

He got out of the car and we put him in the Government car. He got in the Government car with us, and Mrs. David left, walked away.

There was another bag which contained two one-gallon glass jugs. We took the two bags which contained a total of five gallons of alcohol, tax unpaid distilled spirits—none of the jugs had any stamps denoting that there was any tax paid on them—and we proceeded to the office of the Investigator in Charge of the Alcohol and Tobacco
65 Tax Unit.

There I talked to Mr. David and he told me that he was in financial difficulty and he was buying the stuff from a fellow out on the South side for $6.00 a gallon and selling it for $7.00. He was then brought over here and arraigned before the United States Commissioner.

By Mr. Hart:

Q. During the course of your investigation did you know what if any background the Defendant had as to law violations?

A. Yes. I knew—

Mr. Gladstone: I object to that, your Honor.

Mr. Hart: It is part of the evidence of probable cause, may it please the Court.

The Court: He may answer.

A. I knew that Mr. David had been arrested several times and convicted once—

Mr. Gladstone: I object to that.

A. (Continuing) —for possession of alcohol, and—

Mr. Gladstone: I object to that unless you give us the date of that conviction.

The Witness: The date?

Mr. Gladstone: Yes.

66 The Witness: I don't recall. I don't remember. It's quite some time back, but what the actual date is I don't recall.

Mr. Hart: I do not think it is material that he recall the time and date.

Mr. Gladstone: Oh, yes, it is.

Mr. Hart: It is not even material for the purpose of establishing the conviction.

Mr. Gladstone: Oh, yes, it is.

Mr. Hart: It is only material to establish that he knew Herman David was an alcohol tax violator.

The Court: Proceed.

Mr. Gladstone: I think that date is very important, your Honor. If it was in 1939, then it does not have anything to do with this case at all, and it is not admissible.

The Court: Proceed with the examination, please.

By Mr. Hart:

Q. Now, Inspector, did the neighborhood of 45th and Vincennes mean anything to you as an Investigator in this case?

A. Yes, sir, it does.

Q. Will you tell the Court what it means?

Mr. Gladstone: I object to that.

67 Mr. Hart: We do not have a Jury here. I wonder if your Honor would take it, and if it is immaterial strike it out. I think it will be shown that it is material, that the neighborhood does mean something here, because the neighborhood was under surveillance and I think the subsequent witnesses will so testify.

Mr. Gladstone: I will object to that, your Honor. There is a case in my brief that disposes of the idea that Mr. Hart has presented.

The Court: Well, he may testify and if it is not proper I will strike it.

By Mr. Hart:

Q. Will you answer the question, please?

A. What was the question, please?

Mr. Hart: Will you read the question, please, Mr. Reporter.

Q. (Read by the Reporter.)

Mr. Hart: I will strike that. Withdraw the question.

By Mr. Hart:

Q. Will you tell the Court with respect to the neighborhood of 45th and Vincennes, if that had played any part in the investigation in this case?

A. Yes, it had.

68 Q. All right. Will you tell the Court what if anything?

A. Well, at 4502 Vincennes Avenue, on the second floor, there's a man known as Big John—his name is John Binyon—that has operated what we call a speakeasy over the years, and the place had been raided and seizures made there several times.

Q. Did you see the Defendant—

Mr. Gladstone: Just a minute. I object and ask that that be stricken.

Mr. Hart: May it please the Court, it is material to show, as part of the probable cause, that a known bootlegger was in the neighborhood, and a known speakeasy.

The Court: Proceed. I will review that later.

Mr. Hart: Yes.

By Mr. Hart:

Q. Did you ever see the Defendant enter into the address of 4502 South Vincennes?

A. No, sir, I didn't.

Mr. Hart: You may cross examine.

69 *Cross Examination*

By Mr. Gladstone:

Q. Mr. —

A. Hambach.

Mr. Gladstone: I know your name. I was thinking of the question.

By Mr. Gladstone:

Q. Mr. Hambach, where are those shopping bags?

A. Why, those shopping bags were submitted to our finger—

Q. Where are they?

A. I'm going to try to answer that question. Those shopping bags were submitted to our fingerprint man—

Q. That doesn't answer it.

A. (Continuing)—for analysis, and that's the last I know of them. He found some prints on them. However, he can't testify to that.

Q. Well, he was alive at the time we were before Commissioner Pike, wasn't he?

A. Yes.

Q. And he was not present at that time, was he?

A. No, he wasn't.

Q. Now, then, where are the bottles or jugs?

A. The jugs?

70 Q. Yes.

A. Well, sir, we took—Investigator Fletcher took samples from the jugs and we have destroyed the rest of the alcohol and the jugs also.

Q. You have destroyed the jugs?

A. Yes. We have samples from those.

Q. But you destroyed the jugs, didn't you?

A. Yes.

Q. Now, you knew as an experienced investigator that there might be some conflict between your testimony and that of Mr. David, and you knew the importance of the information with respect to the height of the bottles and the height of the top of the bags, didn't you? Didn't you know that might be important?

A. I didn't think there would be any.

Q. Well, you knew, didn't you, that if the evidence of the bags would show that they were two feet in height and that the jugs were only eleven or twelve inches in height, no one could see the jugs looking from the side into the car?

A. Well, I was able to see them.

Q. Did you see them?

A. Yes.

Q. Did you so testify before Commissioner Pike?

71 A. I must have.

Q. Did you tell him that?

A. I certainly did, I believe.

Q. You don't know why the jugs were destroyed, do you?

A. It's the custom.

Q. I beg your pardon?

A. It's our custom, and has been over the years when we make a seizure, we take samples. If we seize a still we take samples of the alcohol and a sample of the mash, and if we seize alcohol, we take a sample of the alcohol, and destroy the containers unless there are fingerprints or something on them that we might want to introduce into evidence.

Q. Now, you knew that if there was some question of fingerprints on the jugs that the jugs would have to be produced, didn't you?

A. We would have to produce them, yes, sir.

Q. You knew if there was any question that they would have to be produced, isn't that right?

A. I didn't know if there would be any question, no, sir. If there were anything there in the way of evidence other than the alcohol we would have retained those jugs.

72 Q. Now, directing your attention to November 6th —

A. Yes, sir.

Q. (Continuing)—did you see any jugs in the car at that time?

A. No, sir.

Q. Did you see anybody carry anything to or from?

A. I didn't see anything other than what I have related here.

Q. Now then—

A. I saw no jugs put in the car or taken from it.

Q. Now, then, on that occasion he went to 45th and Vincennes—

A. Yes, sir.

Q. —is that right?

A. Yes, sir.

Q. I beg your pardon?

A. So far as I know he did. I left him at 45th and South Park, and Investigator Fletcher will testify as to what happened after that.

Mr. Gladstone: I object to what—

The Witness: Well, I left him at 45th and South Park. That is as far as I went.

By Mr. Gladstone:

Q. You had him under investigation, didn't you?

73 A. Yes.

Q. At that time you knew about this place at 4502 Vincennes, didn't you?

A. Yes, sir.

Q. And you didn't follow him to see whether he got out of that car and delivered anything at 4502 Vincennes, did you?

A. No, I didn't.

Q. And on this occasion you didn't wait to see or follow him to see whether he was going to deliver anything to 4502 Vincennes Avenue, did you?

A. No. When I got him in the immediate area, I left him.

Q. I am talking about on the 20th. You didn't do that either?

A. On the 20th?

Q. Yes.

A. Oh, yes.

Q. Did you wait until he took anything—

A. No.

Q. (Continuing)—into 4502 Vincennes Avenue?

A. No, no, no. I took him to 45th and Vincennes.

Q. You knew at that time about the reputation of this place at 4502 Vincennes Avenue, did you not?

74 A. Yes, sir.

Q. And you were suspecting he was going to deliver something to 4502 Vincennes Avenue?

A. That's correct.

Q. And you didn't wait back in the shadows or behind some building or behind some automobile to see whether he delivered anything to 4502 Vincennes Avenue and then follow him there and arrest him there? You didn't do that?

A. I followed him to 45th and Vincennes.

Q. I am asking about 4502 Vincennes Avenue.

A. I followed him to there.

Q. But you didn't wait to see whether he would get out of the car and take any alcohol up to 4502 Vincennes Avenue and arrest him there, did you?

A. When I got there he was already—Investigator Roseboro was already at the car.

Q. I see. Now, when you were before Commissioner Pike, did you testify to any conversation you had with Mr. David—

A. I did.

Q. —at your offices?

A. Yes.

Q. You are sure of that?

75 A. No, I'm not positive. I may have. I don't remember.

Q. Well, did you or didn't you?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Well, on this occasion of November 13th—

A. Yes.

Q. (Continuing)—did you see Mr. David put anything in his car or take anything out of his car on that date?

A. No, sir.

Q. And you went into town?

A. He came into Chicago.

Q. I thought you said he went into Dolton.

A. Oh. On the 13th?

Q. Yes.

A. No. He had nothing in his car that I know of. He went into town.

Q. How long did you follow him then?

A. Well, that would be a matter of minutes, until he got from his house into what I would call the shopping section of Dolton. That's only about a mile.

Q. You didn't follow him after that to see where
76 he was going?

A. He made a light that we didn't make, and I don't know where he went to after that.

Q. How many cars were following him? There were two that time, weren't there?

A. There was another car there besides myself, yes, sir.

Q. And you had a radio in communication, didn't you?

A. That's right.

Q. Ordinarily when you are following a man and you suspect that he may think he is being followed, you send a radio communication to another car to pick him up and then you drop out, isn't that right?

A. If the other car is in a position to pick him up, yes.

Q. Well, you don't know the position of the other car, do you?

A. I believe he was behind me.

Q. Behind you?

A. Yes.

Q. And the man in that car dropped the investigation at that point, too, when he went to Dolton?

A. The chances are I told him, "He made the light and we blew. Just forget about it."

77 Q. On the 20th did you see Mr. David at his home?

A. Yes.

Q. The morning of the 20th?

A. Yes.

Q. Did you see him at his home?

A. Yes.

Q. What time?

A. Well, a few minutes before eight.

Q. Where did you first see him?

A. As he got into the Packard sedan on the front drive, the drive to the south of his house—the morning of the 20th?

Q. Yes.

A. I first saw him at 45th and South Park Avenue.

Q. 45th and South Park Avenue?

A. Yes. I want to correct that.

Q. Now, at that time, either before or at any time on the 20th, did you have a warrant for the arrest of Mr. David?

A. No, sir, I didn't.

Q. Did you have a search warrant in your possession?

A. No, sir.

Q. Now, you weren't in the same car with Mr. Roseboro, were you?

78 A. No, sir.

Q. When you saw Mr. David park, what did you do with your automobile?

A. What did I do with my automobile?

Q. Yes.

A. I cut in behind him.

Q. Behind who?

A. Mr. David.

Q. Behind him?

A. Yes. I followed his car from 45th and South Park to 45th and Vincennes.

Q. When he parked what did you do?

A. He was already parked as I pulled up alongside. He had pulled to the curb and Roseboro was engaged in conversation with him.

Q. Where was your car when you stopped your car?

A. Right alongside.

Q. Alongside of his car?

A. Yes, sir. I was parked double.

Q. Were you driving?

A. Yes; I was driving.

Q. Who was with you in your car?

A. Nobody.

Q. Where was Mr. David with respect to your car? Was he just alongside of you, evenly alongside of you?

A. Evenly alongside of me. He was at the curb and I was in the street.

Q. In other words, the head of your car was parallel to and was just about in the same position as his was?

A. Well, approximately. I may have pulled up a little bit in front of him to block him from trying to get away.

Q. An inch or two, is that right?

A. Maybe half a car length.

Q. Probably half a car length ahead of him?

A. Possibly.

Q. Now, then, where was Mr. Roseboro at that time?

A. He was standing at the door on the driver's side talking to Mr. David—

Q. Yes.

A. (Continuing)—displaying his pocket commission.

Q. And you were in your car at that time?

A. Well, I got out of the car immediately as I pulled up, stopped my car and got out.

Q. Got out?

A. Yes, sir.

Q. Where were you with reference to Mr. Roseboro's position alongside of the car?

80 A. Oh, I had been standing right alongside of Roseboro.

Q. Alongside to his right or left?

A. To his right.

Q. To his right. Now, you looked into the car and you saw those two paper bags, didn't you?

A. I saw two paper bags. I saw one paper bag in which the glass jugs were exposed. There were three jugs in the car—in the bag, and—

Q. Now—

A. (Continuing)—Roseboro had just unscrewed the cap and tasted of the stuff.

Q. You know I am talking about—I should have asked you. What did you see prior to Mr. Roseboro unscrewing the caps?

A. Well, I saw Roseboro standing in the street waving, and with the pocket commission in his hand.

Q. With the pocket commission in his hand?

A. That's right, with the pocket commission in his hand, and I saw the Defendant at the time behind the steering wheel of his car.

Q. You didn't go near the car and examine the bags or the bottles or the caps, did you?

A. I did after Roseboro had—

81 Q. Well, now, I am trying to get what went on before Roseboro—

A. Well, I can't—

Q. (Continuing)—before Roseboro touched the bags or the bottles. What did you see before Roseboro touched the bags or the bottles?

A. I saw David and his wife in the car with the car parked at the curb and Roseboro standing alongside of the car.

Q. Did you look into the car?

A. I did.

Q. What did you see in the back of the car?

A. I saw this bag with the three one-gallon glass jugs.

Q. At that time did you see the jugs?

A. I did, sir.

Q. You could see the jugs?

A. Yes, sir.

Q. How high were those bags, the height of them?

A. They were—I wouldn't venture a guess on the height. They were shopping bags.

Q. About two feet high?

A. Possibly two feet, yes, sir.

Q. What was the height of the bottles?

82 A. Oh, I don't know. A gallon jug—I imagine about that size (indicating).

Q. Eleven or twelve inches?

A. Ten to twelve inches.

Q. Ten or twelve inches?

A. Yes.

Q. Now, could you tell what was in those bottles at the time you looked in there?

A. Yes,—I couldn't tell what was in there. I was told by Roseboro what was in there.

Q. I am asking you whether you could tell.

A. I couldn't tell.

Q. You couldn't tell?

A. It was a colorless liquid, that's all.

Q. It might have been water?

A. It might have been.

Q. It had the same color as water?

A. Yes.

Q. Now, then, when did you see him go into this place at 4502 Vincennes Avenue?

A. I never saw him go in there.

Q. You never saw him go in there?

A. No.

Q. And the only reason you have to believe that he
83 might have been going in there was because this was a place that was owned by a well known speakeasy operator?

A. No. We had received information from a reliable source that he was delivering to this address, delivering alcohol to this address.

Q. Who was the reliable source?

A. Well, it was an informer.

Q. It was an informer?

A. Yes.

Q. What is his name?

A. I know him as Willie Jones.

Q. What?

A. Willie Jones.

Q. Willie Jones?

A. Yes.

Q. Where is Willie Jones located?

A. I don't know where he lives. He used to call me from time to time and I would meet him at different places, appointed places on the South side.

Q. Did he call you on this occasion?

A. Not on this occasion. He contacted me about the first of November, and told me—

Mr. Gladstone: I object to what happened on the 1st of November, your Honor.

84 Mr. Hart: Well, your Honor,—

Mr. Gladstone: I object to what happened on the 1st of November. I am not asking him any question that would call for that reply.

The Witness: What is it?

Mr. Gladstone: Will you read the question to the witness, Mr. Reporter?

Q. (Read by the Reporter.)

A. Which occasion do you mean, Mr. Gladstone?

Mr. Gladstone: The one we are talking about, November 20th.

The Witness: November 20th?

Mr. Gladstone: Yes.

The Witness: No, he didn't.

By Mr. Gladstone:

Q. Now then, on November 6th, you saw Mr. David in the vicinity of 45th and Vincennes Avenue, is that right?

A. I took him to 45th and South Park.

Q. 45th and South Park?

A. Yes.

Q. You knew he was going to 45th and Vincennes?

A. I presumed he was. He went in that direction after he left South Park.

85 Q. On that day had you heard he was going to 4502 Vincennes Avenue?

A. No, sir.

Q. Now, when you were before—by the way, where does this Willie Jones live?

A. I don't know, sir.

Q. Where did you first meet him?

A. Possibly two or three years ago.

Q. Where did you meet him?

A. I met him out on the south side. I can't recall the exact place, but it was on a raid out there.

Q. On a raid out there?

A. Yes.

Q. When you were before Commissioner Pike—

A. Yes, sir.

Q. —you testified, didn't you, at that time?

A. Yes. I'm sure I did.

Q. Let me get it into the record. On July 9th, 1954?

A. I'm sure I did.

Q. At that time was this question asked of you, and did you make this answer—

A. No.

Q. Wait a minute.

A. Oh. Excuse me.

86 Q. Were you asked this question and did you make this answer:

"Q. Who did you get your information from?

"A. Well, that's from a confidential informer whose name I would refuse to divulge."

Was that question asked you and did you make that answer?

A. It's possible.

Q. Well, don't you know?

A. I don't know whether that question was asked and I made that answer or not. If that question was asked, that is probably the answer I gave you.

Q. Did you ever raid the premises at 4502 Vincennes Avenue?

A. No, I didn't; no, sir.

Q. Did you ever arrest the man there?

A. No, I haven't.

Q. Did you ever see the man there?

A. I have seen the man, yes, sir.

Q. In his premises?

A. I have seen him about the premises. He's a great big colored fellow known as Big John.

Q. Big what?

A. Big John.

87 Mr. Gladstone: That is all.

Mr. Hart: Thank you. You may step down, Inspector.

(Witness excused.)

Mr. Hart: Will you ask Inspector Roseboro to step in, please.

The Court: We will just take a two-minute recess, gentlemen.

(Whereupon a short recess was taken, after which the following further proceedings were had herein, to-wit:)

The Court: You may proceed.

Mr. Hart: Will you be sworn, please, Mr. Roseboro.

(Thereupon the witness was duly sworn.)

FRED D. ROSEBORO, called as a witness on behalf of the United States of America, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hart:

Q. Will you state your full name, sir, and spell your last name for the Court Reporter?

A. Fred D. Roseboro, R-o-s-e-b-o-r-o.

Q. Where do you live, Mr. Roseboro?

A. 5944 South Parkway, Chicago, Illinois.

88 Q. What is your business, sir?

A. I'm an investigator in the Alcohol and Tobacco Tax Division, Internal Revenue Service.

Q. How long have you been so employed, sir?

Mr. Gladstone: May I be excused for just a minute?

The Court: Yes.

(There was a short interruption, after which the following further proceedings were had herein, to-wit:)

The Court: You may proceed.

Mr. Hart: Will you read the last question, please.

Q. (Read by the Reporter:)

A. Since February 1st, 1935.

By Mr. Hart:

Q. What are your duties in that capacity?

A. My duties are to investigate complaints of violations of the Internal Revenue laws, and of course, follow it through, prepare case reports, testify in Court, and so forth.

Q. Do you know the Defendant in this case, Herman David?

A. Yes, I do.

Q. If he is present in the Court Room, would you
89 recognize him?

A. Yes, sir.

Q. Do you recognize him in the Court Room?

A. Yes, sir.

Q. Did you have occasion in your official capacity to investigate the Defendant in this case?

A. Yes, sir, I did.

Q. Will you state whether or not that investigation was conducted during November of 1953?

A. It was.

Q. Will you state the dates, sir, on which you saw the Defendant during that month?

A. On November 20th, 1953, I saw him.

Q. Did you see him on any other date during November, other than November 20th?

A. I think I saw him since then, before the Commissioner.

Q. Prior to that date.

A. I don't remember exactly.

Q. Not prior to that date?

A. Not prior to that date.

Q. Will you tell the Court, please, what if anything transpired when you saw the Defeendant on November 20th, 1953?

90 A. I saw the Defendant on November 20th, 1953 at the corner of 45th and Vincennes Avenue in Chicago, Illinois. I saw the Defendant drive an old Packard Sedan automobile in an easterly direction on east 45th Street and park the same near the corner of 45th and Vincennes, on the south side of 45th Street.

I walked over to this Packard sedan and had a conversation with the Defendant. I showed the Defendant my credentials, told him I was a Federal Officer, and asked him what did he have in the car. He said, "Nothing."

I looked in the back of the car on the floor and there were two shopping bags. I saw the neck of what appeared to be one-gallon glass jugs, the type I have known on numerous previous occasions—

Mr. Gladstone: Just a minute. What was that?

The Witness: I saw two one-gallon glass jugs, the neck of two one-gallon glass jugs of a type I have seen on numerous previous occasions.

Mr. Gladstone: Just a minute. I ask that that be stricken, your Honor.

Mr. Hart: I do not know what he is going to answer.

Mr. Gladstone: Well, "of the type I have seen on
91 previous occasions" is objected to, and I move that it be stricken.

The Court: All right. The latter part may be stricken. Proceed.

The Witness: I say, "You have moonshine in this car. I can see it in the back of the car. I am going to search the car." He said—

Mr. Gladstone: You said what? You said, "You have moonshine in the car", and what else?

The Witness: "I can see it in the back." I say, "I am going to search the car."

He said, "Do you have a search warrant? Do you have a search warrant?" I say, "I don't need a search warrant."

Then I told him to get out of the car. He got out of the car. I opened the back door and took one one-gallon glass jug out of one of the shopping bags, and one out of the other. One contained three one-gallon glass jugs and the other contained two.

I unscrewed the top, dipped my finger into the colorless liquid that these jugs contained and tasted and smelled it, and found it to be distilled spirits.

I examined the jugs and I found that none of them bore
Internal Revenue strip tax stamps as required by the
92 Internal Revenue laws.

To Investigator Carl Hambach I said, "It's whiskey", and he placed him under arrest. He was accompanied by his wife at the time.

By Mr. Hart:

Q. Did you know whether or not any other agents of the Alcohol Tax Unit had been investigating the Defendant prior to November 20th?

A. Yes, I did.

Q. Did you know of the progress of the investigation up to November 20th?

A. Yes, sir, I did.

Q. Were you familiar with the neighborhood of 4502 South Vincennes Avenue?

A. Yes, sir, I was.

Q. What if any significance did that neighborhood have or bear to this case?

Mr. Gladstone: I object to that, your Honor.

Mr. Hart: On what ground?

The Court: He may answer.

Mr. Gladstone: It makes no difference.

The Court: He may answer.

A. I knew it was the place of a known bootlegger, that he resided at that address.

93 Mr. Hart: That is all. You may cross examine.

Cross Examination

By Mr. Gladstone:

Q. Now, when you looked in the car you saw the necks of two jugs, did you?

A. That's correct.

Q. Did you see the liquid?

A. No, sir, I didn't, at that time.

Q. Now, you said to him, didn't you, "You are transporting liquor in this car, moonshine liquor", isn't that right?

A. To the best of my recollection I said, "You have moonshine in the car." I could have said, "You're transporting moonshine in the car."

Q. You didn't see any moonshine at that time or prior thereto, did you?

A. No, sir.

Q. In the car?

A. No, I didn't.

Q. I beg your pardon?

A. I say, no, sir, I didn't.

Q. Now—

A. To the best of my recollection, I couldn't see it.

Q. At that time did you have a search warrant?

A. No, sir, I didn't.

94 Q. Did you have a warrant for his arrest?

A. No, sir, I didn't.

Q. You had to put your finger in the bottle in order to taste it and smell it before you knew that there was distilled spirits in that car, isn't that right?

A. I don't think so. I think if I had just smelled it I'd have known it was distilled spirits.

Q. But one or the other you had to do at that time?

A. That is correct.

Q. And you did do that?

A. That's correct.

Q. Did I ask you whether you had a warrant for Mr. David's arrest? I don't recall that.

A. Yes. You did ask me.

Q. And you did not?

A. No, sir.

Q. Nor did you have a search warrant?

A. No, sir.

Q. Where are those glass jugs?

A. Those glass jugs, sir, were destroyed, I presume. It was turned over to Investigator Fletcher, who took samples from the jugs and transmitted them to the United States Chemist.

Q. Did you ask Mr. Fletcher where those jugs were?

95 A. I don't recall ever asking him.

Q. At any time before you came to Court here?

A. I don't recall asking him.

Q. Where are those jugs?

A. I don't know, sir.

Q. What was the size of those bags in height?

A. Oh, I'd say they were—oh, about ten inches. I don't know exactly. Approximately, as I recall.

Q. Ten inches?

A. Approximately, I'd say ten, twelve inches. I don't know exactly.

Q. That is the size—

A. I didn't measure them.

Q. That is the size of the bags?

A. I'd say so, from the best of my recollection.

Q. How deep were the necks of those bottles or those jugs?

A. I don't recall exactly how deep. I'd say a couple of inches, the necks would be; an inch and a half, probably.

Q. How far below the top of the necks of those bottles was there liquid?

A. Just right up to the top.

Q. Right up to the top of the—

96 A. I'd say it was at the top of the neck of the bottle. This was over two years ago. Definitely, I wouldn't want to say. I say to the best of my recollection now; I don't recall just exactly.

Q. When you speak of the top of the neck of the bottles, the neck is narrow and has some height, doesn't it?

A. Yes.

Q. It is about two inches in height?

A. Up to the bottom, I meant.

Q. Yes.

A. As I recall. I say, that was two years ago; I say to the best of my recollection.

Q. What was the height of the bottles?

A. I don't know, sir. It was an ordinary one-gallon jug. The exact height I don't know. I didn't measure it.

Q. Well, what is your estimate of what the height was?

A. My estimate was that the height of the jug was approximately, including the neck, ten or eleven inches, I'd say.

Q. Ten or eleven inches?

A. Yes.

Q. Now, you testified before Commissioner Pike on July 9th, 1954, didn't you?

A. Yes. I think I did. I think that was the date
97 of the hearing. I did testify before the Commissioner on this case, but whether it was July 9th, I would have to refresh my memory.

Q. You were sworn before you testified, weren't you?

A. That is true.

Q. Now, were you asked the following questions, and did you make the following answers:

"Q. You said there were two shopping bags. What were the dimensions of those shopping bags?

"A. The dimensions?

"Q. Yes.

"A. I don't know. I didn't take dimensions on them, sir.

"Q. How high were they?

"A. Oh, I'd say approximately—well, that high (indicating).

"The Commissoner: From here, you mean (indicating)?

"The Witness: Yes, sir.

"Mr. Gladstone:

"Q. Now, you are lowering your hand, you have turned and lowered about two feet high?

"A. I would say that.

"Q. About two feet long?

98 "A. I would say that."

A. I don't recall.

Q. Were those questions asked you and did you make those answers?

A. I don't recall, counsel, whether I did or not. I don't recall those questions. I could have. That was the best of my recollection at the time.

Q. Your recollection was better at that time than it is now, would you say?

A. I would say so. I would think so. I'm not sure whether it was or not.

Q. What was Mr. David's license number?

A. Herman David's license number?

Q. Herman David's license number of that car.

A. Illinois 1953 license plate 2-199-850, as I recall.

Q. So your memory is pretty good, isn't it?

A. Yes, sir. I have refreshed my memory on that particular question.

Q. Have you refreshed your memory on the size of the bags?

A. I didn't make any notation on the size of the bags.

Q. What?

A. I say, I didn't make any notation in my notes that I made at the time as to the size of the bags. They were

99 ordinary shopping bags.

Q. Were you ever at these premises at 4502 Vincennes Avenue?

A. Was I ever there?

Q. Yes.

A. Yes. I've been there since.

Q. I mean, prior to November 20th, 1953.

A. I don't recall going in there.

Q. Did you ever make an arrest there?

A. No, sir.

Q. Did you ever make a raid there on the owner of those premises prior to November 20th, 1953?

A. I didn't myself, no, sir.

Q. Did those jugs have handles on them?

A. No, sir. I don't recall that they had.

Q. You don't recall whether they had handles on them?

A. No, sir.

Mr. Gladstone: That is all.

Redirect Examination

By Mr. Hart:

Q. How long had the Defendant's automobile been parked at the Vincennes Avenue address before you came up to it?

A. Just momentarily. As soon as he parked I got out of the Government vehicle I was in and walked over 100 across the street.

Q. Did you notice anything wrong with the automobile?

A. Anything wrong?

Q. Yes.

A. I don't recall anything.

Q. Did you notice anything wrong with any of the tires?

A. I don't recall anything wrong with them.

Q. Who drove the automobile away?

A. I think I drove the automobile away. I did.

Q. Did you notice anything wrong with it when you drove it away.

A. I don't recall anything being wrong.

Q. Any flat tires?

A. Except it was an old automobile.

Mr. Gladstone: What?

The Witness: I say, it was an old automobile. That's all I recall.

Mr. Hart: No further questions.

Recross Examination

By Mr. Gladstone:

Q. It was a 1937 Packard, wasn't it?

A. I couldn't say exactly what year. I'd say over 101 ten or twelve years.

Q. I beg your pardon?

A. I couldn't say; I wouldn't know exactly what year it was. It was an old Packard automobile, that's all.

Mr. Gladstone: That is all I have.

Mr. Hart: That is all.

(Witness excused.)

Mr. Hart: Will you ask Mr. Fletcher to step in, please.

(The witness was thereupon duly sworn.)

COLUMBUS FLETCHER, called as a witness on behalf of the United States of America, having being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hart:

Q. Will you state your full name, sir, and spell your last name for the Court Reporter?

A. My full name is Columbus Fletcher, F-l-e-t-c-h-e-r.

Q. Where do you live, Mr. Fletcher?

A. 550 East 49th Street, Chicago, Illinois.

Q. What is your occupation, sir?

A. Criminal Investigator for the Alcohol and Tobacco Tax Division, Internal Revenue Service.

102 Q. How long have you been so employed?

A. For a period of two years now, sir.

Q. Do you know the Defendant in this case, Herman David?

A. Yes, sir, I do.

Q. Have you ever had occasion to investigate him?

A. Yes, sir.

Q. Did you have occasion to investigate the Defendant in this case during November of 1953?

A. I did, sir.

Q. Will you state the dates on which you saw him during the month of November, 1953?

A. The first time I saw him in November, sir, was November 6th, 1953.

Q. Any other dates during that month.

A. November 20th again.

Q. Will you state what if anything transpired when you saw the Defendant on November 6th, 1953?

A. On November 6th, 1953, I saw the Defendant drive up in a black Packard Sedan bearing Illinois license plates 2-199-850. He parked this car on the southwest side—

Q. Where is this place?

A. At 45th and Vincennes.

103 Q. Where were you at the time that you saw the Defendant?

A. I was on an adjacent corner, sir, on the northeast side.

Mr. Gladstone: At what intersection was that?

The Witness: On the north side of 45th and Vincennes, sir.

By Mr. Hart:

Q. You saw the Defendant drive up to that address is that right?

A. That's correct, sir.

Q. What if anything happened at that time?

A. The Defendant parked his car on the southwest side of Vincennes and 45th Street. I saw the Defendant sit in the car for approximately five minutes—

Mr. Gladstone: At the southwest corner?

The Witness: Yes, sir.

By Mr. Hart:

Q. Continue, please.

A. He sat in the car for approximately five minutes. At that time he got out of the car, looked around and took two shopping bags out of the rear of the black sedan.

At that time I walked across the street and ap-
104 proached the car and walked by. I saw him take the two shopping bags into the side entrance of the building located there at 45th and Vincennes.

Q. What would be the address of that building, if you know?

A. The address of that building was 4502 South Vincennes Avenue.

Q. What if anything further did you see?

A. After a period of about ten minutes passed I saw Mr. David come out of the building carrying two empty shopping bags. He placed them in the car—

Mr. Gladstone: Wait a minute. You are going a little too fast for me. Thank you.

The Witness: After a period of about ten minutes I saw Mr. David come out of the building, the same side entrance he used to go in—

Mr. Gladstone: A little louder, please.

The Witness: I saw him come out of the same side entrance which he used to enter the building, carrying two empty shopping bags.

By Mr. Hart:

Q. Continue, please.

A. He placed them in the car, got in himself and drove off.

105 Q. Did you see anything further on November 6th, 1953?

A. No, sir.

Q. When did you next see the Defendant?

A. I next saw the Defendant on November 20th, 1953.

Q. What if anything did you see on that occasion?

A. On that occasion at about 9:00 a.m. in the morning—pardon me. That was about ten-thirty in the morning on November 20th, 1953. I saw Mr. David drive up in a black Packard sedan bearing the same license number—license plates as the last time. At this time I was accompanied by Investigator Roseboro.

Q. Did you recognize him to be the same person you had seen on November 6th?

A. I did, sir.

Q. Then what happened?

A. Investigator Roseboro and I got out of the car we were in. We approached the Defendant and I saw Investigator Roseboro show him his credentials and declare that he was a Federal Officer.

I saw him take from the back seat of the car one of the jugs, unscrew it, taste and test the contents, and I heard him declare it was moonshine.

Q. Then what happened, if anything?

106 A. Investigator Carl Hambach came up about this time and I heard him tell David he was under arrest.

Q. Then what happened?

A. The Defendant, Mr. David, was placed under arrest and put into the car with Investigator Carl Hambach and taken to the office of the Alcohol and Tobacco Tax Unit for investigation.

Q. What if anything happened to the jugs you saw in the back of the car?

A. The jugs were taken to the office of the Alcohol and Tobacco Tax Division and I took a composite sample on the 23rd.

Mr. Gladstone: A little louder, please.

The Witness: What?

Mr. Gladstone: Just a little louder.

The Witness: The jugs that were in the car were taken to the office of the Alcohol and Tobacco Tax Division where on November 23rd I took a composite sample from all five one-gallon jugs and transmitted that to the chemist for an analysis.

By Mr. Hart:

Q. You did that personally, sir?

A. Yes, sir.

Q. How did you take the composite sample? Will you tell the Court what you did?

107 A. I took a one-pint bottle and I measured a content from each one of the five one-gallon jugs into this one point, to make a complete one-pint sample, composite sample.

Q. Would you be able to identify that pint bottle again if you were to see it at some time in the future?

A. I would, sir.

Q. How would you be able to identify it?

A. The pint bottle—

Mr. Gladstone: I object to that, your Honor. Counsel has now raised the issue of the evidence here.

Mr. Hart: I think I am entitled—

Mr. Gladstone: Where is the alcohol, the 15 gallons of alcohol or the 25 gallons of alcohol?

The Court: He may answer.

Mr. Gladstone: That is what I want to examine.

By Mr. Hart.

Q. Answer the question, please.

A. The one pint bottle was labelled with the name of the Defendant, where the alcohol was procured from, sealed and initialled by myself.

Q. I see.

Mr. Gladstone: I ask that that be stricken. That has nothing to do with this case. My objection is, or
108 my point is that I want to get some verification as to the size of these jugs and these bags and they should be in Court to see whether anyone can see even the top of those necks.

The Court: It may stand. Proceed.

By Mr. Hart:

Q. Did you know whether or not any other investigators of the Alcohol and Tobacco Tax Unit had been investigating the Defendant in this case?

A. Yes, sir.

Q. Who was conducting the investigation besides yourself, if you know?

A. Investigator Carl Hambach was in charge of the investigation, sir.

Q. On November 20th, 1953, were you familiar with the progress of the investigation at that time?

A. Yes, sir, I was.

Q. You had talked—had you communicated with Investigator Hambach?

A. Yes, sir.

Mr. Hart: I see. Cross examine.

109 *Cross Examination*

By Mr. Gladstone:

Q. Where were you on July 9th, 1954?

A. June 9th, sir?

Q. Yes, 1954.

A. (No answer.)

Q. Do you remember?

A. I don't recall, sir.

Q. Were you before Commissioner Pike?

A. No, I wasn't, sir.

Q. Were you asked to appear there?

A. No, sir, I wasn't.

Q. I beg your pardon?

A. I wasn't asked; I wasn't asked to appear.

Q. Did Mr. Roseboro or Mr. Hambach know about the facts to which you have testified on or before July 9th, 1954?

A. Yes, sir.

Q. When were you first told that you might be a witness in this case?

A. (No answer.)

Q. When were you first asked to be a witness in this case by anybody?

A. I don't recall, sir, the exact date.

110 Q. Well, how long ago?

A. I imagine it was over a year ago, sir.

Q. You were told a little over a year ago that you would be a witness in this case, is that right? That would be November, 1954?

A. I don't remember the exact date, sir.

Q. Prior to July 9th, 1954, were you told that you might be a witness in this case?

A. I don't think I was ever told directly, sir, that I would be a witness in this case. I was an Investigator on the case; I made an investigation on the case, sir—

Q. Just a minute, sir. You have answered the question.

A. All right.

Q. Now, when after November 20th, 1953, did you first discuss this case with anybody?

A. I don't recall, sir, the exact dates. I mean, I might have discussed the case with our investigators or with the Assistant United States Attorney.

Q. When did you first discuss this case with anybody in the District Attorney's Office?

A. I think this morning was the first time, sir, that I discussed the case.

111 Q. The first time?

A. Yes, sir.

Q. Is that correct?

A. Yes.

Mr. Gladstone: Is the file here? I think there is an additional statement by him that I want to look at to ascertain the date.

(There was a short interruption, after which the following further proceedings were had, to-wit:)

By Mr. Gladstone:

Q. You filed an affidavit in this case, didn't you?

A. Yes, sir.

Q. How long ago was that?

A. I don't recall the exact date, sir.

Mr. Gladstone: I would like to have the file.

Mr. Reporter, will you mark this document in pencil as Petitioner's Exhibit 1 for identification, please?

(The document was thereupon marked Petitioner's Exhibit 1, for identification.)

By Mr. Gladstone:

Q. I show you this affidavit marked Petitioner's
112 Exhibit 1 for identification.

A. Yes.

Q. Is that your signature on that affidavit?

A. Yes, sir, it is.

Q. Did you sign it on that date?

A. That's correct, sir.

Q. Where did you sign it?

A. I signed it at the Office of the Alcohol and Tobacco Tax Division, 17 North Dearborn Street, sir.

Q. At whose request?

A. At the request of the supervisor in charge there, sir.

Q. Did you read the Government's Answer at that time?

A. Yes, sir, I did.

Q. Now, you say that on the 6th of November, 1953, you saw Mr. David with two shopping bags, is that right?

A. Yes, sir.

Q. Did you look in the shopping bags?

A. No, sir, I didn't.

Q. Did you make, or attempt to make an arrest at that time?

A. No, sir, I didn't.

Q. You saw him go into the premises at 4502 Vincennes Avenue, isn't that right?

113 A. That's correct, sir.

Q. Did you know where he was going?

A. I had known, sir.

Q. Where was he going?

A. I had known, sir, that there was a known speakeasy at that address.

Q. Did you immediately thereafter seek a search warrant for a search of the premises at 4502 Vincennes Avenue?

A. I did not, sir.

Q. Did you make any arrest immediately thereafter at 4502 Vincennes Avenue?

A. I did not, sir.

Q. Did anybody to your knowledge?

A. To my knowledge, no, sir.

Q. Now, you say that you saw Mr. David come out with two empty shoppings bags?

A. That's correct, sir.

Q. Where were you at the time?

A. I was in the back of his car, sir, approximately—

Q. Whose car?

A. Mr. David's car.

Q. Yes?

A. (Continuing)—approximately ten or fifteen feet 114 from his car.

Q. You were at the opposite corner, weren't you, the diagonally opposite corner?

A. No, sir. I had walked across the street.

Q. You had walked across the street?

A. And passed his car, and I was in the back of his car at the time he came out, sir.

Q. Where were you at the time he was carrying the bags?

A. At the time he was carrying the bags, sir?

Q. Yes.

A. I was crossing the street.

Q. Did you try to look into the bags at that time?

A. No, sir, I didn't.

Q. What are you employed for? What were your duties, I mean, as an Investigator?

A. As an Investigator, sir, my duties at that time were to seek out information on violations of non-tax paid distilled spirits and traffic thereof.

Q. And to make arrests when you saw such violations?

A. Yes, sir, if the violation occurred in my presence.

Q. Well, did a violation occur in your presence on November 6th?

Mr. Hart: I object to that as being a conclusion
115 on the part of the witness, not material to the issues in this hearing.

The Court: Objection sustained.

Mr. Gladstone: Your Honor, what is the purpose, then of introducing this evidence—

The Court: Well, he may answer.

Mr. Gladstone: —on November 6th?

The Court: He may answer.

Mr. Gladstone: Pardon me for interrupting.

The Court: The question is whether he made an arrest, is that it?

Mr. Gladstone: No. Whether a violation occurred.

The Court: Will you read the question, please, Mr. Reporter.

Q. (Read by the Reporter.)

The Court: He may answer.

A. I didn't have to make a violation, sir, at that time—to make an arrest.

By Mr. Gladstone:

Q. Well, what are you testifying about today?

Mr. Hart: Objection to that. Counsel is arguing with the witness.

Mr. Gladstone: That is not argument. I am trying to find out the purpose of his testifying here today.

116 The Court: Objection sustained.

Mr. Gladstone: I beg your pardon?

The Court: Objection sustained.

By Mr. Gladstone:

Q. Did you feel that there was probable cause at that time to make an arrest or search of those bags?

Mr. Hart: That is objected to as being immaterial, as to what the witness felt at that time.

The Court: Objection sustained. That was November 6th, is that it?

Mr. Gladstone: I beg your pardon?

The Court: That was November 6th?

Mr. Gladstone: That was on November 6th, yes.

The Court: Objection sustained.

Mr. Gladstone: If you will permit me to make a statement, your Honor, the only reason they are bringing this man in is because he saw him with shopping bags and they are trying to give you the impression that alcohol was delivered, and that is why they are putting him on the stand, to show they had probable cause to think that maybe he was doing the same thing or intended to do the same thing on November 20th.

The Court: Objection sustained.

Mr. Gladstone: That is all—pardon me. I have nothing further, your Honor.

117 Mr. Hart: Nothing further on behalf of the Government.

Mr. Gladstone: Just a minute, please. I want to put Mr. David back on the stand, and I do have one more question of this witness.

By Mr. Gladstone:

Q. Were you along with Mr. Roseboro and Mr. Hambach and Mr. David when they took him to your office—I have forgotten what you call it—the Treasury Department Office, or Internal Revenue Office?

A. Mr. Hambach was the arresting officer and he took Mr. David to the Office of the Alcohol and Tobacco Tax Division.

Q. Were you there at that time, when they were at the office of the Alcohol Tax Unit?

A. I was, sir.

Q. How long were you there after Mr. David, Mr. Hambach and Mr. Roseboro got there in that room?

A. I don't understand your question, sir.

Q. How long did you remain in the room? You say you were present there?

A. Yes.

Q. How long did you remain there after you first arrived?

118 A. Approximately an hour, sir, more or less.

Q. An hour?

A. Yes.

Q. What conversation took place there? Was there a conversation between Mr. Roseboro and Mr. David?

A. Yes, sir, there was.

Q. Between Mr. Roseboro and Mr. David?

A. Yes.

Q. What was the conversation?

A. The conversation I heard at that time, sir, was an interrogation of Mr. David about his financial status.

Q. What did Mr. David say?

A. I think at that time, sir, he said he had no financial status.

Q. What else was said?

A. I don't recall the exact conversation, sir.

Q. I beg your pardon?

A. I don't recall the exact conversation.

Q. Did he have a conversation with Mr. Hambach at that time?

A. I don't recall any conversation with Hambach.

Mr. Gladstone: That is all.

Mr. Hart: That is all.

(Witness excused.)

119 Mr. Gladstone: Mr. David, will you take the stand again, please.

HERMAN DAVID, the Petitioner herein, recalled as a witness in his own behalf, having been previously duly sworn, was further examined and testified as follows:

Direct Examination.

By Mr. Gladstone:

Q. Mr. David, you have testified earlier this morning?

A. Yes.

Q. Do you know any person by the name of Willie Jones?

A. I don't know him.

Q. Do you recall ever meeting any person by the name of Willie Jones?

A. Never.

Q. I beg your pardon?

A. I never met any Jone, or I don't know any Jone.

Q. When you were at the Alcohol Tax Bureau did you have any conversation with Mr. Hambach in which he asked you about your financial status and you said you were hard up and that you had to sell or bottle some alcohol?

120 A. No, sir.

Q. Did any such conversation take place?

A. No, sir.

Mr. Gladstone: That is all.

Cross Examination.

By Mr. Hart:

Q. What is your occupation, Mr. David?

Mr. Gladstone: I object to that, your Honor.

The Court: Objection sustained.

Mr. Hart: No further questions.

Mr. Gladstone: That is all.

(Witness excused.)

Mr. Gladstone: That is all, your Honor.

Mr. Hart: Are you through?

Mr. Gladstone: Yes. If your Honor wants to hear argument, I am ready to argue the matter. You have written briefs. All I would like to do is now, on the basis of this evidence, to file a reply brief.

The Court: If you want to do that, you may. You may do that within a short time, and I will decide this matter promptly.

Mr. Gladstone: I think you have a brief. This case originated in Judge Campbell's Court, and we submitted briefs to him and then he transferred it.

121 The Court: We have the briefs. Can you do it within five days?

Mr. Gladstone: Will you give me a little more time? I will ask the Court Reporter to write up the transcript, but that will take a few days.

The Court: We will give you ten days to do that in. I do not know whether counsel for the Government will want to reply, but if he does he can do so within five days.

Mr. Gladstone: There is one other thing, your Honor. I have a transcript of Teresa Lucey, a transcript of the testimony before Commissioner Pike. Mr. Hart read it; he had it in his possession for a time.

In lieu of calling Miss Lucey to possibly impeach the statement of Mr. Hambach—he said he didn't remember anything about this conversation that took place at the headquarters of the Alcohol Tax Unit, and the transcript does not show any such conversation—if Mr. Hart will agree to it, I just would like to give you Mr. Hambach's testimony. That will indicate whether he so testified or not.

As a matter of fact, it shows he did not testify regarding that subject matter. Isn't that right?

122 Mr. Hart: I think that is right.

The Court: All right.

Mr. Gladstone: With that statement I do not have to call her as a witness.

The Court: All right, Gentlemen. Ten days for the Defendant and five for the Government, and then I will dispose of it immediately thereafter.

Mr. Hart: Thank you, your Honor.

Mr. Gladstone: Thank you, your Honor.

(Which were all of the proceedings had in the above-entitled cause on the day and date aforesaid.)

123

IN THE UNITED STATES DISTRICT COURT
(Caption—No. 55 CR 110).

CERTIFICATE

I Hereby Certify that I reported in shorthand the proceedings had and testimony taken in the above-entitled cause before the Honorable Win G. Knoch on Monday, December 5, 1955, and that the foregoing typewritten transcript consisting of pages 1 to 82, inclusive, is a true, correct and complete transcript of my shorthand notes so taken as aforesaid.

Official Court Reporter, United States District Court, Northern District of Illinois, Eastern Division.

124

IN THE DISTRICT COURT OF THE UNITED STATES

(Caption—No. 55 CR 110)

JUDGMENT AND COMMITMENT.

On this 19th day of November, 1956, came the attorney for the government and the defendant appeared in person and[1] by his counsel

It Is Adjudged that the defendant has been convicted upon his plea of[2] not guilty and a finding of guilty of the offense of Sections 2803(a) and 3321(a), Title 26, United States Code

as charged[3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court;

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] Two (2) Years

On the defendant's motion it is

Ordered that execution of sentence be and the same is hereby stayed until December 17, 1956 at 12:00 Noon at which time the defendant shall surrender to the United States Marshal.

It Is Further Ordered that stay bond be and the same is hereby fixed in the sum of Three Thousand Dollars ($3,000.00)

It is Adjudged that[5]

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

Win Knoch,
United States District Judge.

The Court recommends commitment to:[5]

November 19, 1956 .....

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3] Insert "in count(s) number ..... " if required. [4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5] Enter any order with respect to suspension and probation. [6] For use of Court wishing to recommend a particular institution.

125

IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—No. 55 CR 110) • •

NOTICE.

To: Honorable Robert Tieken
United States District Attorney

Please take notice that on Tuesday, the 27th day of November A.D. 1956, at the opening of Court or as soon as counsel can be heard, I shall appear before the Honorable Judge Win G. Knoch in the room usually occupied by him as a Courtroom in the Federal Court House, Clark and Adams Streets, Chicago, Illinois, or before such other Judge as may be sitting in his stead and then and there move the Court to fix an Appeal Bond of the defendant in the above entitled cause.

Myer H. Gladstone
Myer H. Gladstone
Attorney for Defendant

Received a copy of the aforesaid Notice this 27th day of November A.D., 1956.

R. Tieken
United States District Attorney

126

IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—No. 55 CR 110) • •

Tuesday, November 27, 1956

Present: Honorable Win G. Knoch, District Judge

On motion of the defendant by his counsel it is Ordered that the bond on appeal be and the same hereby is fixed in the amount of Three Thousand Dollars ($3000.00)

127

IN THE DISTRICT COURT OF THE UNITED STATES
* * (Caption—No. 55 CR 110) * *

NOTICE OF APPEAL.

Name and address of appellant:
Herman David
14823 Grant Street
Dolton, Illinois

Name and address of appellant's attorney:
Myer H. Gladstone
134 North LaSalle Street
Chicago 2, Illinois

Offense: Appellant, Herman David, was charged by indictment with violations, on November 20, 1953, of Sections 2803(a) and 3321(a), Title 26, United States Code, alleging in two counts, possession of five gallons of distilled spirits, the containers of which did not have proper tax stamps affixed thereto, and removal of 5 gallons of distilled spirits, for and in respect whereof a tax was imposed, with intent to defraud the United States of such tax.

Statement of Judgment or Order and dates thereof:
On September 21, 1956, the Honorable Judge Win Knoch found appellant guilty as charged, and on
128 November 19, 1956, the said Judge entered judgment on the said finding of guilt, and ordered the appellant committed to the custody of the Attorney General for a period of two years.

Appellant is at liberty on bail in the sum of $3,000.00.

The above named appellant hereby appeals to the United States Court of Appeals for the Seventh Circuit from the above stated judgment.

Herman David
By Myer H. Gladstone
His Attorney

129

IN THE DISTRICT COURT OF THE UNITED STATES
• • (Caption—No. 55 CR 110) • •

CERTIFICATE OF MAILING.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that on the 28th day of November, 1956, in accordance with Rule 73(b) of the Federal Rules of Civil Procedure and Criminal Procedure, a copy of the foregoing Notice of Appeal was mailed to:

Honorable R. Tieken, United States Attorney
450 United States Court House
Chicago 4, Illinois

Honorable Kenneth J. Carrick, Clerk
United States Court of Appeals, Seventh Circuit
1212 Lake Shore Drive
Chicago 10, Illinois

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid
(Seal) Court at Chicago, Illinois, this 28th day of November, 1956.

Roy H. Johnson
Clerk
By Gizella Butcher
Deputy Clerk

130

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 55 CR 110) • •

STATEMENT REQUIRED UNDER RULE 12(d) OF THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The appellee is:
United States of America.
The names and address of counsel for the appellee are:
R. Tieken, United States Attorney
John Peter Lulinski, Assistant U. S. Attorney
Joseph E. Tobin, Assistant U. S. Attorney
450 U. S. Court House
Chicago 4, Illinois

R. Tieken
R. Tieken,
United States Attorney.

131

IN THE DISTRICT COURT OF THE UNITED STATES

• • (Caption—No. 55 CR 110) • •

STIPULATION RE RECORD ON APPEAL.

It is hereby stipulated by and between the parties hereto, by their respective attorney, that in preparing the record in the above-entitled matter on the appeal of the defendant to the United States Court of Appeals for the Seventh Circuit from the judgment and sentence entered in this case, the Clerk of the District Court shall include in the said record the following pleadings, documents and orders:

1. Statement in accordance with Rule 12(d) of the Court of Appeals.
2. The Indictment; filed February 25, 1955.
3. Plea of not guilty entered by the defendant; entered March 18, 1955.

4. Order granting leave to file Motion to Suppress Evidence; entered May 5, 1955.

5. Petition to Suppress Evidence; filed May 5, 1955.

132 6. Answer of Government to Petition to Suppress Evidence; filed May 23, 1955.

7. Reply of defendant to Government's Answer to defendant's Petition to Suppress Evidence; filed June 20, 1955.

8. Order allowing a Motion of Government to file instanter affidavit of C. Fletcher; entered September 12, 1955.

9. Order denying defendant's Motion to Suppress Evidence; entered February 10, 1956.

10. Memorandum of Court; filed February 10, 1956.

11. Proceedings of September 21, 1956, with respect to jury waiver and stipulation that evidence heretofore presented on Motion to Suppress Evidence should be submitted to Court, together with further stipulation between the parties as the evidence on the question of guilt or innocence of the defendant should be submitted to the Court.

12. Transcript of proceedings of trial and hearing on September 21, 1956.

13. Order that defendant's motion for judgment of acquittal be denied.

14. Finding of the Court that defendant is guilty and setting the matter for disposition to October 31, 1956.

15. Transcript of proceedings before Judge Knoch on December 5, 1955; filed September 24, 1956.

16. Judgment of Court committing the defendant to custody of the Attorney General for a period of two years; entered November 19, 1956.

133 17. Order fixing bond on appeal in amount of $3,000.00; entered November 19, 1956.

18. Notice of Appeal of defendant-appellant; filed November 28, 1956.

19. A copy of this Stipulation.

20. Any order that may be entered extending the time to file the record on appeal.

21. Such orders as may be entered in connection with the preparation of this record and the exhibits and the transmittal thereof to the Court of Appeals.

22. Any Stipulations which may be entered into and orders entered pursuant thereto.

R. Tieken
United States District Attorney
Myer H. Gladstone
Attorney for Defendant,
Herman David

134

(Caption—No. 55 CR 110)

IN THE DISTRICT COURT OF THE UNITED STATES

NOTICE.

To: Honorable Robert L. Tieken
United States Attorney

Please Take Notice that on Thursday, the 3rd day of January, 1957, at the opening of Court or as soon thereafter as counsel can be heard, I shall appear before the Honorable Judge Win Knoch in the room usually occupied by him as a courtroom in the Federal Court House at Clark and Adams Street, Chicago, Illinois, or before such other judge as may be hearing his motion call, and move to extend the time for filing the Record on Appeal in the above entitled cause with the United States Court of Appeals for the Seventh Circuit to and including February 11, 195[illegible]

and to extend the time for docketing the appeal in the United States Court of Appeals for the Seventh Circuit to February 11, 1957.

Myer H. Gladstone
Myer H. Gladstone
134 North La Salle Street
ST ate 2-3950

Received a copy of the above
and foregoing Notice this 2nd
day of January, A.D. 1957.
R. Tieken
United States District Attorney

135

IN THE UNITED STATES DISTRICT COURT
* * (Caption—No. 55 CR 110) * *

ORDER.

It Is Ordered that the time for filing by Herman David, defendant-appellant, of the Record on Appeal with the United States Court of Appeals for the Seventh Circuit, in connection with the appeal taken by the said Herman David from the order and judgment entered November 19, 1956, be and hereby is extended to and including February 11, 1957.

It Is Further Ordered that time for docketing the appeal in the United States Court of Appeals for the Seventh Circuit be and is hereby extended to February 11, 1957.

Dated: January 3rd, 1957.

Enter:

Win G. Knoch
Judge

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United States of America
Northern District of Illinois—ss.

I, Roy H. Johnson, Clerk of the United States District Court for the Northern District of Illinois, do hereby certify that the annexed and foregoing are the original papers constituting the record on appeal in the cause entitled: United States of America, Plaintiff vs. Herman David, Defendant, No. 55 CR 110, as follows:

Indictment filed February 25, 1955.

Order entered March 18, 1955, showing arraignment and plea of not guilty.

Order entered May 5, 1955 granting leave to file motion to suppress evidence.

Petition to Suppress Evidence filed May 5, 1955.

Answer of Government to Petition to Suppress evidence filed May 23, 1955.

Reply to Government's Answer to Defendant's petition to suppress evidence filed June 20, 1955.

Order entered September 12, 1955 allowing motion of Government to file instanter Affidavit of C. Fletcher.

Memorandum and order entered February 10, 1956.

Order entered September 21, 1956, ordering evidence heretofore presented on motion to suppress evidence to be submitted to the Court; denying defendant's motion for judgment of acquittal and referring cause to Probation Department of this Court for a presentence investigation and setting disposition to October 31, 1956.

Clerk's File Copy of Transcript of Proceedings had before the Honorable Win G. Knoch, District Judge on September 21, 1956, and filed February 6, 1957.

137 Clerk's File copy of Transcript of Proceedings had before the Honorable Win G. Knoch, District Judge on December 5, 1955, and filed September 21, 1956.

Judgment and Commitment entered November 19, 1956.

Notice re setting of appeal bond filed November 27, 1956.

Order entered November 27, 1956 fixing appeal bond in the sum of $3000.00.

Defendant's Notice of Appeal filed November 28, 1956 (Clerk's Certificate of mailing attached).

Statement required under Rule 12(d) of the Rules of the United States Court of Appeals for the Seventh Circuit filed December 11, 1956.

Stipulation re record on appeal filed December 14, 1956.

Notice of defendant for extension of time filed January 3, 1957.

Order entered January 3, 1957, extending the time for docketing the appeal to February 11, 1957.

Filed and entered among the records of the said Court in my office, on the dates indicated.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 6th day of February, 1957.

Roy H. Johnson

Clerk

(SEAL)

By Gizella Butcher

Deputy Clerk

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
AUG 22 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 394

HERMAN DAVID,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MYER H. GLADSTONE,
134 North La Salle Street
Chicago 2, Illinois
Attorney for Petitioner

UNITED STATES LAW PRINTING CO., CHICAGO 18, ILL. LAKEVIEW 8-6881

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

HERMAN DAVID,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Herman David, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was

entered on November 19, 1956, and is not reported but appears in the printed Report of Proceedings before the Court of Appeals for the Seventh Circuit, filed herewith, and certified by the Clerk of said Court, at page 88 of the Transcript of Record.

The Opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed June 20, 1957, and is not yet reported but is set forth in the Appendix hereto and in the certified copy of the record.

JURISDICTION

On July 23, 1957, it was ordered that the Petition for Rehearing be denied (The orders of the Court of Appeals appear in the Appendix to this Petition). This Petition is filed within thirty days of the denial of the Petition for Rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether Government agents have probable cause to search a parked automobile without a search warrant or warrant for petitioner's arrest upon the ground that they had received information "from a reliable source," that the petitioner was delivering alcohol to a certain address known to them as the residence of a known bootlegger, that they knew petitioner had been convicted for possession of alcohol "quite some time back," and that the parked car was in the immediate vicinity of the residence of the "known bootlegger," but they had no actual knowledge on the day of the search that the petitioner would or did carry alcohol in his automobile.

2. Whether the result of an unlawful search and seizure converts it into a lawful one.

3. Where the Government refuses or fails to produce evidence exclusively under its control, concerning which there is a material conflict between the Government and the petitioner, does not a presumption arise that such evidence, if produced, would be unfavorable to the Government and favorable to the petitioner?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Pertinent Sections of Statutes involved herein and in force on the date the crimes are alleged to have been committed, as charged in the Indictment, are as follows:

Section 2800(a)(1), Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 724):

> "There shall be levied and collected on all distilled spirits in bond or produced in or imported into the United States an internal revenue tax at the rate of $10.50 on each proof gallon or wine gallon when below proof and a proportionate tax at a like rate on all fractional parts of such proof or wine gallon, to be paid by the distiller or importer when withdrawn from bond. On and after April 1, 1955, the rate of tax imposed by this paragraph shall be $9 in lieu of $10.50."

Section 2803(a), Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 734-735):

> "§2803. Stamps for containers of distilled spirits
>
> "(a) Requirement. No person shall transport possess, buy, sell, or transfer any distilled spirits, unless

the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits."

• • •

"(g) Any person who violates any provision of this section, • • • shall on conviction be punished by a fine not exceeding $1,000, or by imprisonment at hard labor not exceeding five years, or by both."

Section 3321, Title 26, U.S.C.A. (Internal Revenue Code of 1939, as amended, volume, page 869):

"§ 3321. Removal or concealment with intent to defraud the revenue

"(a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both."

STATEMENT OF THE CASE

The petitioner was convicted of the violation of Section 2803(a), Title 26, U.S.C., and of Section 3321(a), Title 26, U.S.C., as the same existed during the year of 1953. Prior to the trial the petitioner filed a petition to suppress certain evidence, five gallons of distilled spirits. The petition alleged that on November 20, 1953, while petitioner was seated in an automobile on the southeast corner of 45th Street and Vincennes Avenue, in Chicago, Illinois, two Alcohol Tax Unit Agents, Fred D. Roseboro and Carl Hambach, searched said automobile, and found and seized five one-gallon glass jugs containing alcohol, which jugs were in two shopping bags on the floor of the automobile back of the driver's seat. At the said time the agents did not have a warrant for petitioner's arrest, nor a search warrant to search either him or the automobile, nor any other process.

The petitioner further alleged that said search and seizure was not made pursuant to and incidental to a lawful arrest, and that the agents did not have sufficient knowledge of facts or circumstances to believe that the laws of the United States of America were then and there being violated.

A hearing was had on the motion to suppress and the Court denied the same. When the cause came on for trial, petitioner waived a trial by jury, and on stipulation of the parties, by their attorneys, it was ordered that the evidence which had been presented on the foregoing motion to suppress evidence "shall be submitted to the Court as evidence on the question of the guilt or innocence of the defendant." On November 19, 1956, the Trial Court found the petitioner guilty and sentenced him to two years' imprisonment.

Count I of the Indictment charges that the petitioner, Herman David, on November 20, 1953 did unlawfully have in his possession five gallons of distilled spirits, the immediate containers of which did not have affixed thereto stamps denoting the quantity of distilled spirits contained therein and evidencing payment of all internal revenue taxes imposed upon such spirits, as required by law; in violation of Section 2803(a), Title 26, United States Code.

Count II charged that the petitioner, on said date did unlawfully and willfully remove, deposit and conceal certain goods and commodities, to-wit, five gallons of distilled spirits, for and in respect whereof a tax was then and there imposed, with intent to defraud the United States of such tax; in violation of Section 3321(a), Title 26, United States Code. (R. 10).

EVIDENCE

The evidence consisted of the testimony of the petitioner, Herman David (R. 33-42) and four Government witnesses: Agent Carl G. Hambach (R. 42-62), Agent Fred D. Roseboro (R. 62-72) and Agent Columbus Fletcher (R. 72-84).

Herman David, the petitioner, testified that on November 20, 1953, at 10:30 A.M., he parked his car at 45th Street and Vincennes Avenue, Chicago. A man came up to him and told him that he was under arrest. He had no warrant of arrest with him nor a search warrant (R. 34). The petitioner had five one-gallon jugs containing spirits in the back of the car. These jugs were about 11 inches high and were in shopping bags. The tops of the bags were about 8 to 10 inches above the tops of the jugs. Paper was on top of the jugs, which were not visible to anybody who might look into the bags (R. 34). The man who arrested petitioner took the automobile and the jugs with him. Petitioner parked the car because it seemed as if a tire was going flat. He was not about to make a delivery of alcohol to 4502 South Vincennes Avenue (R. 38, 39).

Carl G. Hambach, an Agent of the Alcohol Tax Unit, testified that he had occasion to make an investigation of Herman David, first beginning in the latter part of February or the first part of March, 1953 (R. 43). He saw David on November 6th, 12th, 13th and 20th, 1953 (R. 44). On November 6th he was watching David's home in Dolton and saw him leave in a Packard automobile, accompanied by a lady and a Boxer dog. He followed the automobile and dropped him at South Park and 45th Street. There he contacted Investigator Fletcher on the radio (R. 44, 45).

Hambach further testified that he saw the petitioner around the latter's home in Dolton on November 12th and 13th, followed him, but lost him in town and did not see where the petitioner went (R. 45). On November 20th he saw the petitioner park his car at the curb on 45th Street and Vincennes Avenue, and talk to Investigator Roseboro. Through the window he was able to see in the back of the car a paper bag that contained three one-gallon glass jugs. Investigator Roseboro *had taken* the cap off one of them and tasted it and said "It's alcohol." Hambach then said to David, "You're under arrest" (R. 46).

Hambach further testified that he knew that the petitioner had been arrested several times, and, over objection, was permitted to testify that David was convicted for possession of alcohol "quite some time back" (R. 47). He was asked, on direct examination, whether the neighborhood of 45th and Vincennes meant anything to him and, over objection, he stated that on the second floor at 4502 Vincennes Avenue, a man known as Big John has operated a speakeasy for several years, and the place had been raided and seizures made there several times. The Court stated, on motion that this testimony be stricken, that he would review it later. The witness never saw the petitioner at 4502 South Vincennes (R. 49).

Hambach testified further, on cross examination, that Investigator Fletcher took samples from the jug, and the rest of the alcohol and jugs were destroyed (R. 50). He did not attach any importance to the fact that there might be some conflict between his testimony and that of Mr. David with respect to the height of the bottle and the height of the top of the bags (R. 50).

On further cross examination, the witness testified that he *suspected* the petitioner was going to deliver *something* to 4502 Vincennes Avenue, but did not wait to see whether he would get out of the car and take any alcohol up to 4502 Vincennes Avenue and arrest him there, because when he got to 45th and Vincennes Investigator Roseboro was already at the car (R. 52, 53). At the time of the arrest of the petitioner, he had neither a warrant for Mr. David's arrest nor did he have a search warrant in his possession (R. 55). He saw a bag with the three one-gallon glass jugs in it. The bags were about two feet high. The jugs were about 10 to 12 inches high. He could not tell what was in the bottles at the time he looked in the car (R. 58). The liquid was colorless; it might have been water.

Hambach never saw the petitioner go into the place at 4502 Vincennes Avenue (R. 59). He testified that "we had received information from a reliable source that he (David) was delivering alcohol to this address." This reliable source was an informer, Willie Jones. The witness did not know where Willie Jones lived. Jones used to call him from time to time, and he would meet Jones at appointed places on the South Side. Jones did not call the witness on this occasion, November 20, and on that day he had not heard that the petitioner was going to 4502 Vincennes Avenue (R. 59, 60). He first met Jones two or three years ago on the South Side, in a raid; he didn't know where this Willie Jones lives (R. 60, 61). Hambach never

raided the premises at 4502 Vincennes Avenue. He never arrested the man there (R. 61). He has seen the man about the premises. He is a colored man, known as Big John (R. 62).

Fred D. Roseboro, an Agent in the Alcohol Tax Unit, saw the petitioner on November 20, 1953. He didn't see the petitioner prior to that date. On November 20, 1953, he saw David in an old Packard sedan parked near the corner of 45th and Vincennes Avenue. He asked David what he had in the car, and David answered "Nothing." The witness saw two shopping bags on the floor, in the back of the car. He saw the neck of what appeared to be one-gallon glass jugs (R. 64).

He said to David: "You have moonshine in this car. I can see it in the back of the car. I am going to search the car." David asked Rosebor whether he had a search warrant and Roseboro replied, "I don't need a search warrant" (R. 65).

The witness took one jug out of one of the shopping bags, and one out of the other. He unscrewed the top, dipped a finger into the colorless liquid in the jugs and tasted and smelled it, and found it to be distilled spirits. He *then* placed David under arrest (R. 65).

Over objection, Roseboro testified that he knew 4502 S. Vincennes Avenue was the residence of a known bootlegger (R. 66).

On cross examination, the witness testified that he saw the *necks* of two jugs but did not see the liquid at that time (R. 66). He stated to David: "You have moonshine in the car," or "You're transporting moonshine in the car." Roseboro did not see any moonshine in the car at that time or prior thereto (R. 66, 67). He had no search warrant at the time, nor a warrant for the arrest of David. At

the time he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and that is what he did: put his finger in the bottle in order to taste it and to smell it (R. 67).

The witness presumed that the glass jugs were destroyed. They were turned over to Investigator Fletcher. He did not recall ever asking Fletcher where those jugs were, prior to coming to court (R. 67). He estimated the bags as being 10 or 12 inches in height, he did not measure them. The necks of the bottles were about 1½ or 2 inches long. The liquid in the jugs came to the top of the necks of the bottles. The necks are narrow, about 2 inches in height.

Roseboro could not recall ever being at the premises at 4502 S. Vincennes prior to November 20, 1953. He never made an arrest there, nor made a raid prior to November 20, 1953 (R. 70, 71).

Columbus Fletcher, a Government Alcohol Agent, testified that he first saw the defendant on November 6, 1953, parking his car at 45th and Vincennes Avenue (R. 73). After David parked his car he carried two shopping bags into the side entrance of 4502 S. Vincennes Avenue. After a passage of 10 minutes, the witness saw David come out of the building carrying two empty shopping bags; he then saw David drive away (R. 74, 55). On November 20th, he saw the petitioner at 45th and Vincennes at about 10:30 in the morning. He saw Roseboro take one of the jugs from the rear of the petitioner's car, unscrew it, taste and test the content and heard Roseboro say it was moonshine (R. 75). Fletcher testified further that Investigator Hambach came up *then* and told David he was under arrest (R. 75).

On November 6, 1953, Fletcher did not look in the shopping bags that David carried, nor did he attempt to make an arrest at that time (R. 80). Immediately after David entered 4502 South Vincennes Avenue he did not seek a search warrant, nor did he make any arrest at 4502 Vincennes thereafter (R. 80). To his knowledge, nobody else made an arrest (R. 81). At the time David was carrying the bags across the street, on November 6, Fletcher did not try to look into the bags. His duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrest if the violations occurred in his presense (R. 81).

The petitioner, being recalled, testified that he did not know any person by the name of Willie Jones, nor could he recall ever meeting a person by that name (R. 85).

It was stipulated that if the Government chemist were present he would testify that Exhibit 1, a pint bottle, contained alcohol. This stipulation was subject to the defendant's objection that the evidence is inadmissible because of an illegal search and seizure. The Court overruled the objection and ordered the evidence as stipulated be admitted to evidence (R. 29).

Petitioner's counsel made a motion for judgment of acquittal but the same was denied (R. 30).

The Court then found the petitioner guilty of the charge in the Indictment (R. 30, 88) and ordered the petitioner committed to the custody of the Attorney General for imprisonment for a period of two years (R. 88).

The Court of Appeals for the Seventh Circuit affirmed the judgment of the District. Mr. Justice Major dissented, stating that the federal officers did not have probable cause to search the petitioner's automobile without a warrant.

REASONS FOR GRANTING WRIT

1. The Court of Appeals for the Seventh Circuit in its decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in that its decision is based upon a complete misapprehension of the facts in the case, and has applied a rule of law justifying the search and seizure not justified by the facts.

2. The Court of Appeals for the Seventh Circuit has rendered a decision in conflict with the decisions of the Courts of Appeals for the Second, Fifth, Sixth, Eighth, Ninth, and District of Columbia Circuits.

3. The Court of Appeals has decided a Federal question in a way conflicting with applicable decisions of this Court.

4. The Court of Appeals sanctioned a custom of the Alcohol Tax Unit of destroying evidence, thus depriving defendants of the right and opportunity to have such evidence available in Court to defendants when necessity and justice so required.

ARGUMENT.

I.

There Was No Probable Cause Sufficient To Authorize The Federal Agents To Search Petitioner's Automobile Without A Warrant.

It is manifest from the evidence heretofore related, of the three Investigators for the Alcohol Tax Bureau, that the following facts and situation existed in connection with the arrest of the petitioner, and the search for and seizure of distilled spirits found in his car, on November 20, 1953:

1. None of the Government agents had a search warrant to search the car of the Defendant, nor a warrant for his arrest.

2. None of the investigators had any information from an informer, or otherwise, that the Defendant would have distilled spirits in his possession on November 20, 1953.

3. Prior to the search of the Defendant's car, the agents did not know that distilled spirits were in the car.

4. Roseboro, the agent who made the search, could only see the necks and a couple of glass jugs, and could not see any liquid in the jugs as they rested in shopping bags.

5. The glass jugs were from 10 to 12 inches in height, and the shopping bags which contained them were about 20 inches in height or more.

6. The liquid in the glass jugs was colorless, and without tasting or smelling the contents, could have been water, mineral oil, distilled white vinegar, or any similar colorless liquid.

7. Roseboro had to taste and smell the liquid, by inserting a finger therein, before he knew that the liquid was distilled spirits.

8. The search and seizure was not made as an incident to a lawful arrest; on the other hand, the arrest of the petitioner followed the unlawful search and seizure.

9. The place where the petitioner's car was searched and the alcohol seized was in the immediate neighborhood of a known bootlegger, but none of the agents ever saw him prior to November 20, 1953, nor did they ever raid his premises nor arrest him, nor were they ever on his premises.

The Court of Appeals overlooked most of the foregoing facts and based its decision on the testimony of Government Investigators, who acted on information from a "reliable" source to the effect that the petitioner was delivering alcohol to a speakeasy, put him under surveillance and observed him taking two shopping bags out of the rear of his sedan and enter the "suspect locale," and then shortly emerge carrying two shopping bags. Apparently the "suspect locale" was known by one of the Investigators to have been a second-story speakeasy, which had been raided several times. These were the only facts upon which the Circuit Court of Appeals concluded that there was probable cause for the search of petitioner's car on November 20, 1953, together with the facts recited in the case of *United States* v. *Walker*, a decision of the Circuit

Court of Appeals for the Seventh Circuit, filed June 10, 1957. Since this decision is not reported, petitioner has included the same in his Appendix to this petition. (10-A)

The Court of Appeals has so misapprehended the application of the *Walker* case to the petitioner's case that the situation calls for supervision by the Supreme Court. In the *Walker* opinion, the Court of Appeals for the Seventh Circuit stated (page 12-A of the Appendix):

> "Obviously we must first decide if this arrest of Walker without a warrant was valid in order to determine the legality of the search clearly incidental to that apprehension. No array of authorities is necessary for supporting the familiar rule that lawful arrest is an indispensable condition precedent to a closely allied search and seizure."

Finding that there was a lawful arrest made prior to the search, the Court of Appeals found that the search was incidental to a lawful arrest.

However, in Petitioner's case just the opposite situation existed. Agent Roseboro made the search *first*, and finding that the jugs contained whiskey, Carl Hambach *thereupon* placed David under arrest (R. 65). At this page of the Record we find that Agent Roseboro said, "I am going to search the car." David said, "Do you have a search warrant?" Roseboro said, "I don't need a search warrant." He then took one of the jugs out of a shopping bag, unscrewed the top, dipped his finger into the colorless liquid, and tasted it and smelled it, and found it to be distilled spirits. He found no Revenue Tax Stamps on the jug. He then said to Agent Hambach, "It's whiskey," and Hambach placed David under arrest (R. 65).

In this testimony Roseboro was corroborated by Hambach who testified, "Roseboro had taken the cap off of one of them (glass jugs) and tasted it, and he said, "It's

alcohol,' and he then said to David, 'You're under arrest. Get out of the car' " (R. 46).

Similarly, the third Government Agent Columbus Fletcher, testified that he saw Roseboro unscrew one of the jugs, taste the contents and declare that it was moonshine. At this time Hambach came up and placed the petitioner under arrest. In applying the unreported case of *United States* v. *Farris Walker* to the petitioner's case, it is obvious that the Court of Appeals misapprehended the facts in the petitioner's case and thereby used an inapplicable rule of law to justify the search and seizure in petitioner's case.

The Court of Appeals recited certain facts that the Investigators were aware of, and added "and more," after which they halted the petitioner while he was driving his car. The petitioner's car was already parked near the corner of 45th and Vincennes Avenue when Agent Roseboro identified himself and made the search and seizure (R. 64).

On November, 20, 1953 the date of the search and seizure, the Government agents and investigators did not have any information from any source whatsoever that David was about to carry alcohol in his automobile when he left his home, or that he was to deliver any alcohol to the vicinity of 45th and Vincennes Avenue (R. 59, 60).

The Court of Appeals appears to have erroneously held as a fact that, on November 6, 1953, the petitioner carried *alcohol* in two shopping bags from his automobile to 4502

Vincennes Avenue, because Agent Fletcher testified that he saw the petitioner carry two shopping bags in to the aforesaid premises, and the same appeared to be empty when petitioner came out of those premises. The mere fact that Fletcher did not then and there arrest David and search the bags, and did not cause a search warrant to be issued for the search of the premises at 4502 Vincennes Avenue, not make an arrest at that address (R. 80), is the most convincing evidence that Fletcher had no suspicion or knowledge that the petitioner was carrying alcohol or other contraband in the shopping bags on November 6, 1953. To Fletcher's knowledge, nobody else made an arrest (R. 81). Fletcher's duties as an investigator were to seek out information on violations of non-tax paid distilled spirits and to make arrests if the violations occurred in his presence (R. 81). At no time prior to the search of petitioner's car did the Agents have any knowledge that the petitioner was about to commit a crime or was in the commission of a crime, and, without a warrant of arrest, they could not have legally arrested the petitioner. Therefore, the search was not incidental to a lawful arrest.

Furthermore, the testimony of Hambach and Roseboro, that the building at 4502 Vincennes Avenue was the residence of a known bootlegger and that he had been arrested a number of times and his place raided, is manifestly their personal conclusion. As heretofore shown in the evidence recited, neither Agent Roseboro nor Agent Hambach ever saw this bootlegger, they never personally raided the premises, they never made an arrest there, they were never in the premises, and their testimony with respect to the reputation of the place is worthless. Similarly, the testimony of Agent Hambach, that he received information from a reliable source that the petitioner was delivering

alcohol to 4502 Vincennes Avenue, is a worthless conclusion. It set forth no facts indicating that Hambach had previously tested the informer's reliability. He didn't even know where the informer "Willie Jones" lived (R. 59, 60).

The decision of the Court of Appeals for the Seventh Circuit is in conflict with the decisions of the Courts of Appeals for the Fifth, Sixth, and Ninth Circuits.

In a Fifth Circuit case, *Emite* v. *United States*, 15 F. 2d 623, a search was made of an automobile moving on a public highway; the automobile was stopped by Federal officers. The Fifth Circuit Court of Appeals stated (page 624):

> "The testimony of the witness, not only did not show that, before the search was made, the officers had probable cause to believe that an offense had been committed, but indicated the absence of such probable cause. Probable cause did not exist, unless the facts and circumstances within their knowledge, and of which they had reasonably trustworthy information, were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched. *Carroll* v. *United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 39 A.L.R. 790; *Pales* v. *Paoli* (C.C.A.) 5 F. (2d) 280."

The Court further found that the testimony indicated that the officers had no knowledge or information of any willful use of the searched car, or that its owner or an occupant of it had committed or intended to commit any criminal offense. The Court further stated that the testimony as to what a Government witness had been told did not indicate that his informant was trustworthy; or that he even claimed to know what he said was true. On the question of the reputation of premises, the Court further held (page 624):

"A search without warrant of an automobile is not justified by a mere suspicion, based on the facts that it came from a small town having the reputation of being a haven for bootleggers, and that it had been seen parked on an ice manufacturer's premises which were said to be used for parking cars which hauled liquor from that place.

"On its face the testimony of the witness negatived the conclusion that, prior to the search of the automobile, the witness or the other officer, by the use of their senses or otherwise, had learned of facts that would warrant a reasonably prudent man in believing that it then was being used in transporting liquor, or in the commission of any other crime. It appearing on the face of the testimony that the knowledge of the witness of the fact that the automobile contained intoxicating liquor was obtained by a search made without a warrant, and without probable cause to believe that a crime was being committed in his presence, that testimony was subject to be excluded on the ground that the knowledge of the witness of the incriminating facts deposed to was obtained by a violation of the constitutional provision against unreasonable searches."

In the petitioner's case, Agent Hambach did not know that the petitioner was going to deliver any alcohol to 4502 Vincennes Avenue. He testified that he was "suspecting" that the petitioner was going to deliver "something" to 4502 Vincennes Avenue (R. 53).

In a Ninth Circuit case, *Brown* v. *United States*, 4 F. 2d 246, an officer, being the only witness at the trial, testified that the plaintiff in error in that case parked his car at the curb of a street, removed a package from the back part of the car and started up the street; the package was not smooth, and from its appearance might contain bottles. He then placed the said plaintiff in error under arrest. Prior to that time the witness had been informed that the plaintiff in error was a bootlegger, and the license number of the car driven by the plaintiff in error had been furnished

him but the source of his information was not disclosed in either case. On another occasion the plaintiff in error had delivered a package at an office building, and the form of the package indicated it might contain two bottles, but what the package contained he did not know. Beyond the foregoing, the officer had no knowledge of any kind, and no information from any source, that a crime *was being* committed in his presence. The Court of Appeals stated (page 246):

> "If, instead, of arresting the plaintiff in error, the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error; no magistrate would hold the plaintiff in error to answer for a crime before another tribunal; no grand jury would indict; no court would submit the case to a jury; and, if the officer were sued for false imprisonment, no court would instruct that the arrest was justified, assuming all the foregoing testimony to be true. If we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property wrongfully seized was not admissible in evidence."

In a Sixth Circuit case, *Wisniewski* v. *United States*, 47 F. 2d 825, 826, the facts and conclusions of the Court are as follows:

> "The arresting officers testified that on August 23, 1930, they had been 'informed' that the defendant, who was said to be dealing in intoxicating liquors, was to make a delivery during that forenoon at his meat market at 900 Michigan Avenue in the city of Grand Rapids; that similar information had been received on four previous occasions from the same informer with reference to others, and that it had on each such other occasion proved reliable; and that the delivery was to be made either in a Studebaker sedan bearing license No. 594,190, or in an Essex coach

bearing license No. 594,191. They also testified that before the time in question information had been received from the deputy administrator that defendant was selling whiskey at his meat market.

"*With this information as the basis for suspicion, possibly insufficient in itself to constitute probable cause*, the officers went to the vicinity of defendant's place of business for purposes of observation." (Italics supplied.)

There the officers *saw* the defendant talking to a known bootlegger who handed the defendant a burlap sack and a jug which the defendant placed in his own automobile. Shortly thereafter the officers arrested the defendant in his automobile and found the jug covered by a burlap sack upon the seat. The jug contained whiskey. Because of these additional facts the Court of Appeals affirmed the lower Court's judgment.

In another Fifth Circuit case, *Clay* v. *United States*, 239 F. 2d 196, the Court of Appeals in a lengthy opinion arrived at conclusions opposite to the instant decision of the United States Court of Appeals for the Seventh Circuit, the subject matter hereof.

It seems clear that this Honorable Court must intervene to correct a violation of the Fourth Amendment to the Constitution of the United States, involved in the search of the petitioner's automobile on November 20, 1953, and the seizure of the distilled spirits found therein by Government Alcohol Agents.

II.

The Result Of An Unlawful Search And Seizure Does Not Convert It Into A Lawful One.

The Court of Appeals decided this Federal question in a way conflicting with applicable decisions of this Court. In other words, the Court of Appeals by approving the

search and seizure tacitly held that the results thereof justified the search.

In the case of *Byars v. United States*, 273 U.S. 28, 29, 71 L. Ed. 520, 522, 47 S. Ct. 248, the Supreme Court held:

> "Nor is it material that the search was successful in revealing evidence of a violation of a federal statute. A search prosecuted in violation of the Constitution is not made lawful by what it brings to light; and the doctrine has never been recognized by this Court, nor can it be tolerated under our constitutional system, that evidences of crime discovered by a federal officer in making a search without lawful warrant may be used against the victim of the unlawful search where a timely challenge has been interposed. *Weeks* v. *United States*, 232 U.S. 383, 393, 58 L. ed. 652, 655, L.R.A. 1915B, 834, 34 Sup. Ct. Rep. 341, Ann. Cas. 1915C, 1177; *Gouled* v. *United States*, 255 U.S. 298, 306, 65 L. ed. 647, 651, 41 Sup. Ct. Rep. 261; *Amos* v. *United States*, 255 U.S. 313, 65 L. ed. 654, 41 Sup. Ct. Rep. 266; *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 391, 64 L. ed. 319, 321, 24 A.L.R. 1426, 40 Sup. Ct. Rep. 182; *Agnello* v. *United States*, 269 U.S. 20, 33 70 L. ed. 145, 149, 46 Sup. Ct. Rep. 4."

Similarly, in the case of *United States* v. *Di Re*, 332 U.S. 581, 595, 92 L. Ed. 210, 220, 68 S. Ct. 22, the Supreme Court stated:

> "The Government's last resort in support of the arrest is to reason from the fruits of the search to the conclusion that the officer's knowledge at the time gave them grounds for it. We have had frequent occasion to point out that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success.
>
> "We meet in this case, as in many, the appeal to necessity. It is said that if such arrests and searches cannot be made, law enforcement will be more difficult and uncertain. But the forefathers, after consulting

the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment. Taking the law as it has been given to us, this arrest and search were beyond the lawful authority of those who executed them. The conviction based on evidence so obtained cannot stand."

III.

The Court Of Appeals Sanctioned The Destruction Of Evidence By The Alcohol Tax Unit, And By Its Decision Permitted The Said Agency To Refuse And Fail To Produce Evidence Which A Defendant May Deem Necessary To His Defense.

The distilled spirits which were illegally seized were missing at the trial except for one pint, which was preserved for use in the trial of the petitioner. The shopping bags and the glass jugs were missing. The Federal Agents testified that they were destroyed according to custom. The petitioner argued in his Brief filed in the Court of Appeals that it is a strange situation, indeed, that agents can determine what portion of the evidence seized they shall bring into the Court. Certainly, they should not be the judges of what evidence should be retained and produced in Court and what evidence might be destroyed and not produced in Court. The fact that the Alcohol Tax Unit established a custom of destroying evidence which its officers felt might not be needed at the trial is no excuse. The production of the shopping bags and the glass jugs would have shown the relative size of each, and it could have been easily determined at the trial of the petitioner, by placing the jugs within the bags, whether anybody could see even the necks of the glass jugs.

The petitioner cited the case of *Scanlon* v. *United States*, 223 F. 2d 382, 392, holding that where evidence is in the possession of an adverse party, and he fails to produce the same, the presumption arises that the said evidence would be unfavorable to him.

To the foregoing argument, the Court of Appeals commented:

> "*Scanlon* v. *United States*, 223 F. 2d 382 (1st. Cir. 1955) is unconvincing on defendant's theory that failure to produce the jugs and shopping bags in possession of the government gives rise to a presumption that the evidence would have been unfavorable to the prosecution's case. The *government witnesses testified to the destruction of that evidence as was their custom.* Counsel for David does not contest the presence of alcohol, for he so stipulated; the only contention hinges on the size of the bags and jugs. Such flimsy argument fails to destroy the government's case here. *McDonald* v. *United States*, 89 F. 2d 128 (8th Cir. 1937)." (Italics supplied.)

The *McDonald* case, cited and relied on by the Court of Appeals for the Seventh Circuit, did not condone a custom of destroying evidence. It only excused a single "unwise, hasty, unnecessary and improvident act." The persons who destroyed the evidence, in the *McDonald* case, did so unwittingly, and it was never intended to call them as witnesses. The situation is entirely different in the petitioner's case. Hambach, Fletcher and Roseboro knew, or should have known, that they would be the principal witnesses against the petitioner and as experienced investigators they should have known that the height of the bags in which the jugs were contained compared to the height of the jugs, could well determine whether they could actually see the jugs while they were in the shopping bags. More to the point is the case of *United States* v. *Graham*, 102 F. 2d 436.

CONCLUSION.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MYER H. GLADSTONE
of Chicago, Illinois
Attorney for Petitioner

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11969 SEPTEMBER TERM, 1956—APRIL SESSION, 1957

THE UNITED STATES,
Plaintiff-Appellee,

v.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 20, 1957

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Much of what we said in our recent opinion reported as *United States* v. *Walker,* No. 11975, June 10, 1957, governs the disposition of this appeal. For again we have the claim made on behalf of a convicted[1] defendant that there was no probable cause sufficient to authorize a search of his automobile by Federal officers acting without a warrant.

A hearing was had on the motion to suppress. The defendant, having waived trial by jury, subsequently stipulated through his counsel with the government that the evidence presented at the suppression hearing should "be submitted to the court as evidence on the question of the guilt or innocence of the defendant."

[1] Under a two-count indictment for violation of 26 U. S. C. § 2803(a) and 26 U. S. C. § 3321(a).

This is an instance where government investigators, acting on information from a reliable source to the effect David was delivering alcohol to a speakeasy put him under surveillance and observed him take two shopping bags out of the rear of his sedan, enter the suspect locale, then shortly emerge carrying two empty shopping bags. Roughly two weeks after that episode, investigators aware of those facts, and more, halted Davis while he was driving his car. These investigators looked through the car window and saw two shopping bags and the necks of what appeared to be 1-gallon glass jugs containing colorless fluid. Roseboro, a government investigator, opened and searched David's car, unscrewed a jug top, dipped his finger into the fluid, tasted and smelled distilled spirits. Internal Revenue Stamps were conspicuous by their absence. Hambach, another investigator who was present at the seizure, knew that David had several times been arrested and once convicted for the unlawful possession of alcohol. The address where David made his first appearance, already noted above, was known by Hambach to have been a second floor speakeasy, which had been raided several times. The strong showing of probable cause dissipates any doubt about the correctness of denying the defense motion to supress the evidence, *United States* v. *One 1946 Plymouth Sedan Automobile*, 167 F. 2d 3 (7th Cir. 1948), see also *United States* v. *Walker, supra.*

Counsel agreed below that if the government's chemist testified, his evidence would establish that the composite sample contained in a one pint bottle was alcohol. *Scanlon* v. *United States*, 223 F. 2d 382 (1st Cir. 1955) is unconvincing on defendant's theory that failure to produce the jugs and shopping bags in possession of the government gives rise to a presumption that the evidence would have been unfavorable to the prosecution's case. The govern-

ment witnesses testified to the destruction of that evidence as was their custom. Counsel for David does not contest the presence of alcohol, for he so stipulated, the only contention hinges on the size of the bags and judge. Such flimsy argument fails to destroy the government's case here. *McDonald v. United States*, 89 F. 2d 128 (8th Cir. 1937).

Judgment affirmed.

MAJOR, *C.J.*, dissenting. In my view, the federal officers did not have probable cause to search defendant's automobile without a warrant. Consequently, the motion to suppress the evidence obtained by such search should have been allowed. I would reverse the judgment.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B.

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago 10, Illinois

Thursday, June 20, 1957.

Before

Hon. J. Earl Major, Circuit Judge

Hon. Philip J. Finnegan, Circuit Judge

Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11969 vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, ***Affirmed.***

APPENDIX C.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois

Tuesday, July 23, 1957

Before

Hon. J. Earl Major, Circuit Judge
Hon. Philip J. Finnegan, Circuit Judge
Hon. Walter C. Lindley, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 11969 vs.

HERMAN DAVID,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing in this cause be, and the same is hereby, *Denied.*

APPENDIX D.

IN THE

UNITED STATES COURT OF APPEALS
For the Seventh Circuit

No. 11975. SEPTEMBER TERM, 1956, APRIL SESSION, 1957.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FARRIS WALKER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 10, 1957.

Before DUFFY, *Chief Judge*, FINNEGAN and SCHNACKENBERG, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* After a pre-trial hearing on defendant Farris Walker's motion to suppress (Fed. R. Crim. P. Rule 41) physical evidence taken from his person, the motion was overruled because, the trial judge thought Treasury enforcement agent D. Spillane had "reasonable ground" to believe Walker was committing a crime. That ruling is the sole basis put forward for reversal of the judgment entered upon finding Walker guilty by the dis-

trict judge, sitting without a jury, on both counts of a two-count indictment.[1]

Walker testified in support of his motion, grounded on

[1] In substance, count 1 charged that Walker did ". . . then and there knowingly, wilfully, and unlawfully purchase from a person, whose name or names are to the said grand jury unknown, a quantity of a certain narcotic drug, to wit, approximately 343 grains of heroin," and in count 2, "fraudulently and knowingly receive, conceal, buy and facilitate the transportation and concealment after importation into the United States of a quantity of a certain narcotic drug. . . ."

Section 4704(a) of the Internal Revenue Code of 1954, provides in relevant part: ". . . It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax paid stamps from narcotic drugs *shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.*" 68A Stat. 550, 26 U. S. C. § 4704(a). (Italics supplied).

Walker was arrested for allegedly violating the law in force and effect on August 13, 1956. Consequently it will have to be assumed that Count II citing 21 U. S. C. 174 refers to the amendment of 65 Stat. 767 by the Narcotics Control Act of 1956, 70 Stat. 567, approved July 18, 1956, which through its § 105 (70 Stat. 570) provides:

"Section 2(c) of the Narcotic Drugs Import and Export Act, as amended (U. S. C. Title 21, sec. 174) is amended to read as follows:

"'(c) Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"'Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"'For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954.'"

U. S. Const. Amendments[2] IV and V, and Federal agent Spillane gave testimony on behalf of the government on the issue raised by that motion. Adams, the other agent with Spillane at the time Walker was apprehended, did not testify at the suppression hearing. Confining ourselves, for the moment, to evidence adduced at that hearing the operative facts follow.

Walker, who had never been previously arrested, left his home on August 13, 1956 at about 1:30 in the afternoon in his automobile accompanied by two adults [one of whom was Kemp Wallis] and defendant's three-year old grandson. While Walker was proceeding along South Parkway, a public street, in Chicago, Illinois, his automobile was curbed by another vehicle, near 43rd Street, in which Federal agents Spillane and Adams were riding. Walker and all occupants of his automobile were ordered out and told to place their hands on the top of the vehicle and submit to search. Walker testified that one of the officers said that they were under arrest, and when defendant asked the agents "if they had a warrant . . . they said sure . . ."

When Walker asked the reason for his arrest he was told to "keep quiet" and he obeyed. After being searched Walker was jailed and later released on bail. Under questioning of his own attorney, Walker stated that at the time of the arrest, search and seizure, he "was not violating any laws whatever"; "just driving down the street."

Turning now to the testimony given by Agent Spillane for the government during the suppression proceedings,

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[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U. S. Const., Amend. IV.

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." U. S. Const., Amend V.

he stated that on August 13, 1956 "At approximately 12:45 . . . [he] received a telephone call from an informant who . . . [he] had had previous dealings with, who had proved to be a reliable informant. . . ." This testimony about the informant's reliability was stricken on motion by defense counsel so that the substance of Spillane's testimony on this phase of the case results in evidence that he received information concerning the defendant and led him to this point:

> "Upon the conclusion of the conversation I made a check of the files in my office for the name Farris Walker, which check was negative. His name was not in our files.
>
> "The second thing I did, I called the Central Police Station, the Narcotic Detail, and made a check over the telephone on Farris Walker. They gave me a positive check.
>
> "Mr. Turner: [Defense Counsel]: I will object to what they gave him.
>
> "The Court: Sustained."

Asked by the Assistant United States Attorney what he did "next," Spillane testified: "The next thing I did, in the company of Agent Adams I proceeded to my automobile and went directly to the vicinity of 43rd and Forrestville Avenue. I parked my car on the north side of 43rd Street, a short ways east of Forrestville, and at that time I was observing a green 1950 or 1951 Pontiac Sedan that has been previously described to me over the telephone:

> "I stayed in this position for maybe two, maybe one to three minutes, and then I moved the car, my own car, around the corner, went south on Forrestville, passed the Pontiac in question, drove to the intersection of 44th Street and Forrestville, made a U-turn

north on the east side of Forrestville Avenue, where I parked the car. I stayed in the car for approximately three to five minutes, and I was using binoculars at the time, observing this Pontiac, '51 Pontiac. . . ."

"I maintained surveillance on the Pontiac through binoculars for approximately three minutes, about five minutes—I am a little hazy on exactly the time I was watching it, but eventually I saw the defendant, dressed in a brown suit and a panama hat, in company of another man, whom I knew—who we had arrested maybe three weeks prior to this time—a man by the name of Kemp Wallis, and then a third party whom I didn't know, and a little boy. I saw them come around the corner, evidently came from east on 43rd made a right turn there, walked south on Forrestville Avenue to the side of the Pontiac in question. They stood out in front of the Pontiac for a minute or two. They they [*sic*] all got in the car. As soon as they got in the car the driver, who was defendant Farris Walker, backed into the alley, made a U-turn, and was facing south. He backed into the alley, made a turn and proceeded north on Forrestville to the corner of 43rd and Forrestville. He made a left turn and went west on 43rd. . . ."

". . . I was observing the defendant, inasmuch as he answered the description that I had received over the telephone.

". . . As I said, I was observing the defendant; he had a white panama hat and chocolate brown suit, and his description tallied with the description I had previously received."

"By the Witness:

A. Yes, I did have information. The information I had was that defendant would be with Kemp Wallis.

Mr. Turner: I will object to that.

The Court: He has answered the question.

By the Witness:

A. Who I knew from a previous arrest.

By Mr. Makar:

Q. And did you know anything concerning Kemp Wallis?

A. Yes, I knew that I had arrested him.

Mr. Turner: Your Honor, I am objecting. They are not pertinent to the motion to suppress.

By the Witness:

A. I knew Kemp Wallis due to the fact that I had executed a search warrant at 223 Forrestville a few weeks prior to this time and he was in the apartment when we raided this place.

By Mr. Makar:

Q. Did you know as to the relationship that Kemp Wallis had with this particular defendant?

A. Yes, I did. Defendant, I believe, was the ex-husband of a certain Marie Walker. Marie Walker is the sister of Kemp Wallis. Marie Walker is known to our office. We have files on her; the police have files on her. Kemp Wallis we did not have a file on. But as I said he was arrested in Marie Walker's apartment a few weeks prior to the arrest of the defendant."

Continuing his direct testimony, Agent Spillane described how he and Agent Adams followed defendant's car and that at 43rd and South Parkway Spillane pulled abreast of Walker's car; Agent Adams informed Walker that he (Adams) and Spillane were federal narcotic agents. Agent Spillane then stated: "I came out of my car, went over to his car, and asked him if his name was Farris Walker. He said it was. I told him he was under arrest . . ." After that, according to Spillane, he put Walker up against the car with his hands on top of the roof, and

"I made a search for weapons, which is part of our routine, and in searching the defendant, in his right suit coat pocket I found a Phillip Morris cigarette package containing a glassine envelope with a white powder inside it. In his left suit coat pocket I found a cellophane cigarette wrapper containing nine small

pieces of notebook paper, which paper contained a white powder. I asked defendant what the stuff was. He said in substance—he said to me, 'You know what it is. It is stuff. You got me good.'"

Cross-examination of Spillane by defense counsel contains this exchange:

"Q. You didn't hear this man's voice on the telephone, or any other man's voice on the telephone, did you?

A. Only the informer's voice.

Q. Only the informer's voice. Now then, you had no record, there is no record in your department of Farris Walker being a violator of narcotic laws. There was not at the time you received this call from the informer?

A. Not in our department.

Q. Not in your department. That is what I [am] asking you, in your department. So that at the time you went out on the South Side of Chicago you had no knowledge, you knew nothing about Farris Walker, did you?

A. I knew his description.

Q. Of your own knowledge? Wait a minute. You see, I am just asking you a plain question. Maybe I will come back and let you say what you want to say. You had no knowledge of your own about Farris Walker, did you?

A. I don't know him.

Q. You didn't know him, did you?

A. No."

Obviously we must first decide[3] if this arrest of Walker without a warrant was valid in order to determine the legality of the search clearly incidental to that apprehen-

[3] "There is no formula for the determination of reasonableness of the search and seizure. Each case is to be decided on its own facts and circumstances." *Roichia* v. *United States*, 78 F. 2d 966, 969 (9th Cir. 1935).

sion. No array of authorities is necessary for supporting the familiar rule that lawful arrest is an indispensable condition precedent to a closely allied search and seizure.[4]

Several important aspects of the problem now under review were subjected to judicial scrutiny in *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951) where Mr. Justice Clark, writing for the majority, stated:

> "The Fourth Amendment prohibits both unreasonable searches and unreasonable seizures. . . . Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. See *Weeks* v. *United States*, 232 U.S. 383 (1914); *Agnello* v. *United States*, 269 U.S. 20 (1925). Only where incident to a valid arrest, *United States* v. *Rabinowitz*, 339 U. S. 56 (1950), or in 'exceptional circumstances' *Johnson* v. *United States*, 333 U.S. 10 (1948), may an exemption lie, and then the burden is on those seeking the exemption to show the need for it, *McDonald* v. *United States*, 335 U. S. 451, 456 (1948). In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficient purposes intended. . . . Officers instead of obeying this mandate have too often, as shown by the numerous cases in this court, taken matters into their own hands and invaded the security of the people against unreasonable search and seizure."

Congress has supplied a new factor, in narcotic cases through the vehicle of the Narcotic Control Act of 1956 under § 104(a), of which, power is conferred upon agents

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[4] "When a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." *Carroll* v. *United States*, 267 U. S. 132, 158 (1925).

of the Bureau of Narcotics to: ". . . make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . or marihuana . . . where the violation is committed in the presence of the person making the arrest or where such person has *reasonable grounds* to believe that the person to be arrested has committed or is committing such violation." 70 Stat. 570, 26 U. S. C. § 7607. (Supp. IV, 1957). (Italics ours).

Of course even under a legislative enactment typified by § 104(a) we would refrain from permitting such authority to override constitutional rights and privileges. Use of legislative history requires caution and critical analysis. With that awareness we think § 104(a) reflects Congressional response to the narcotics situation in our country and that, indeed, it is a problem. See *e. g.* Narcotics, 22 Law & Contemp. Problems (1957). Difficulties confronting the law enforcement branches of government charged with enforcing the relevant laws were described in the House Subcommittee Report on Narcotics, 2 U. S. Code Cong. & Adm. News 3302 (1956).

> "Your subcommittee's inquiry into the enforcement program revealed serious obstacles which have been placed in the path of enforcement officers as the result of recent court decisions. These decisions have tended, under certain circumstances, to furnish the criminal with a cloak of immunity to the detriment of society as a whole. They have forced changes in recognized investigative procedures which had been sanctioned by the courts for many years. The narcotics traffickers, who are in most cases well-organized professional racketeers, take full advantage of any limitations placed on enforcement officers.
>
> "In some instances enforcement officers have been restricted in their right to arrest without a warrant, and to search and seize contraband before and after

a valid arrest. The use of evidence of admissions and confessions following an arrest has been curtailed. Narcotic enforcement officers are restrained from intercepting telephone conversations, even though the telephone is a major instrument of communication between the top narcotic traffickers, and could often provide the necessary evidence to convict these violators. The enforcement officers are required to secure an arrest warrant or a search warrant from a magistrate even though circumstances indicate the impracticability of such a procedure. Narcotic drugs are small in volume and high in price. A fortune in drugs can be concealed under clothing and can be destroyed, or moved to a place of safety on a moment's notice. The delay involved in obtaining a warrant from a magistrate permits the destruction or removal of the narcotic evidence and allows the narcotic traffickers to escape prosecution for their crime. These and other restrictions on enforcement officers leave the public unprotected and give narcotic violators, especially the more reprehensible larger racketeers and wholesalers, an advantage over law-enforcement officers in efforts to combat the illicit narcotic traffic. The subcommittee urges that corrective measures in these areas be taken immediately to permit enforcement officers to operate more effectively."

Our decision takes shape against that background but with constitutional rights outweighing any practical considerations which would ultimately generate corrosion of those privileges.

After reversal of the conviction under review in *United States* v. *Coplon*, 185 F. 2d 629 (2d Cir. 1950) Congress amended § 3052 of Title 18 U.S. Code to read: "The Director, Assistant to the Director, Assistant Directors, Inspectors, and Agents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests without warrant for any offense against the United States

committed in their presence, or for any felony cognizable under the laws of the United States *if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.*" 64 Stat. 1239, 18 U. S. C. § 3052 (Supp. IV, 1952 ed.) (Italics added). Because the italicized language is now virtually identical with that phraseology used in § 104(a)(2) we thought it significant, especially in light of the legislation following in the wake of Judge Learned Hand's disposition of the Coplon arrest under the earlier version of § 3052. 185 F. 2d 629, 634-635. See also: *Coplon* v. *United States*, 191 F. 2d 749, 753-754 (D. C. App. 1951) decided under the wording of 18 U. S. C. § 3052 as it stood on March 4, 1949. If Judge Hand thought that "the Act of 1934 was intended to be a constitutive, not cumulative, grant of any powers of arrest which the agents were to have," certainly the latest version, paralleled by § 104(a)(2), has eliminated the strictures he found lurking in § 3052. We think *United States* v. *Di Re*, 332 U. S. 581 (1948) is distinguishable because since that decision, Congress enacted a federal rule of arrest for agents of the Narcotics Bureau. Section 104 (a)(2) is the legislative source of power and authority under which the arrest of Walker must be measured. Resort can be made to closely analogous precedent for ascertaining the meaning of "reasonable grounds" in that section.

Reasonable grounds is the precursor to a valid arrest without a warrant under § 104(a)(2) and a subsequent successful search does not cure an otherwise defective arrest. The arrest of Walker must be validated without any resort to the fruits of the search. At the hearing below the trial judge unduly restricted the government's showing because that proceeding in no way concerned the

issue of Walker's guilt or innocence. The key issue at that suppression hearing was whether Spillane had reasonable grounds to believe that Walker had committed or was committing a violation of any law of the United States relating to narcotic drugs. Communication emanting from the informer was relevant to show that Spillane obtained knowledge about Walker forming the foundation on which the agent built his cause for acting. The informer's testimony was not offered at the pre-trial hearing for the purpose of proving Walker guilty of the offenses for which he was about to be tried—the issue at that preliminary stage is related to Spillane's state of mind. See *e. g.* 6 Wigmore, Evidence § 1789 (3rd ed. 1940). We think under the facts developed here, evidence classed as hearsay from Walker's viewpoint, but not Spillane's, can constitute the basis for reasonable grounds leading to an arrest without a warrant.

That Walker's arrest preceded the challenged search is undisputed on the record before us. The Agents stopped Walker's car only because of what the informer related to them, coupled with their check of police records, and not because they were impelled by their observations. Nothing else shows in this record as the basis for apprehending Walker and, of course, the narcotics in his coat pocket were not open to view until Spillane "frisked" Walker. Statutes aside, an arrest without a warrant on bare suspicion unsupported by reasonable grounds is illegal. "Prob-

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[5] *Carroll* v. *United States*, 267 U. S. 132, 161-162 (1925) contains the familiar summary by Mr. Chief Justice Taft, when speaking for the majority of a divided court:

"The necessity for probable cause in justifying seizures on land or sea, in making arrests without warrant for past felonies, and in malicious prosecution and false imprisonment cases has led to frequent definition of the phrase. In *Stacey* v. *Emery*, 97 U. S. 642-645, a suit for damages for seizure by a collector,

able cause" and "reasonable grounds" are concepts having virtually the same meaning.[5] Chief Justice Shaw, speaking for a court reviewing an action for malicious prosecution, wrote in *Bacon* v. *Towne*, 58 Mass. 217, 238-239 (1849): "Probable cause is such a state of facts in the mind of the prosecution as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion, that the person arrested is guilty." Even earlier in our judicial history Chief Justice Marshall had already stated this interpretation: ". . . the term 'probable cause',

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(footnote 5 cont.)

this Court defined probable cause as follows:

'If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient.' *Locke* v. *United States*, 7 Cranch, 339; *The George*, 1 Mason, 24; *The Thompson*, 3 Wall. 155. It was laid down by Chief Justice Shaw, in *Commonwealth* v. *Carey*, 12 Cush. 246, 251 that 'if a constable or other peace officer arrest a person without a warrant, he is not bound to show in his justification a felony actually committed, to render the arrest lawful; but if he suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful.' *Commonwealth* v. *Phelps*, 209 Mass. 396; *Rohan* v. *Sawin*, 5 Cush. 281, 285. In *McCarthy* v. *DeArmit*, 99 Pa. St. 63, the Supreme Court of Pennsylvania sums up the definition of probable cause in this way (page 69):

'The substance of all the definitions is a reasonable ground for belief in guilt.'

In the case of the *Director General* v. *Kastenbaum*, 263 U. S. 25, which was a suit for false imprisonment, it was said by this Court (page 28):

'But, as we have seen, good faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent, which in the judgment of the court would make his faith reasonable.'"

The term "reasonable ground" was subjected to judicial evaluation in *United States* v. *Bell*, 48 F. Supp. 988, 992 (D. C. Calif. 1943) and we think the interpretation sponsored there is sound

according to its usual acceptation; means less than evidence which would justify condemnation; and in all cases of seizure, has a fixed and well-known meaning, it imports a seizure made under circumstances which warrant suspicion. . . ." *Locke* v. *United States*, 11 U.S. 338, 348 (1813).

United States v. *Sebo*, 101 F. 2d 889, 890 (7th Cir. 1939) evoked our court's view: "Probable cause has been defined as reasonable grounds of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the party is guilty of the offense with which he is charged."

When, as here, a search and seizure is intimately related to an arrest without a warrant, the legality of the arrest dictates whether the search is unreasonable and running afoul of the Fourth Amendment. See; *e. g.* J. Hall, Legal and Social Aspects Of Arrest Without A Warrant, 49 Har. L. Rev. 566 (1936); Sam B. Warner, The Uniform Arrest Act, 28 Va. L. Rev. 315, 331 (1942). To evaluate Spillane's action without a warrant requires reaching back behind his reason for categorizing Walker as suspect. The cue to such categorization was supplied by the informer to Spillane who, in turn, used that data, along with other information, for deciding if Walker had committed or was (at that time) committing a violation. Obviously what the informer said became the stimulus input for Spillane and a trial judge should evaluate such evidence when deciding if Spillane acted on reasonable grounds. In *Costello* v. *United States*, 350 U. S. 359 (1956) all of the evidence before the grand jury was in the nature of "hearsay" yet that condition did not invalidate the indictment. The technical rules of evidence regarding hearsay come into greater [illegible]stance at a trial on the merits especially when jurors are participating. But in an instance of the type now before us strict application of the

hearsay[6] rule is a sterile technicality of not an incorrect application of the exclusionary rule. If the government's offer[7] of proof is examined along with those pieces of testimony received below there emerges the requisite reason-

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[6] For example, see: *United States* v. *Li Fat Tong*, 152 F. 2d 650, 652 (2nd Cir. 1945): "But it is contended that it (an arrest without a warrant) was unlawful because based upon hearsay evidence obtained from the Chicago Office (of the Narcotic Bureau) and through informers whose names were not divulged. We recently held, however, in *United States* v. *Heitner*, 149 F. 2d 105, 106 that an arrest may be made upon hearsay evidence, and cited as authority the ruling in *Carroll* v. *United States*, 267 U. S. 132 . . . *Dumbra* v. *United States*, 268 U. S. 435, 441 . . . ; *Husty* v. *United States*, 282 U. S. 694, 700, 701."

[7] "If he would be permitted to testify as to the phone conversation he had with the informer prior to any of the acts which had occurred and about which this witness had testified concerning the arrest and the search of the particular defendant, this witness would testify as to the following:

That he received information from an informer, whom he recognized and had previous dealings with that informer. He recognized that informer's voice. And that the informer told him that this particular defendant, naming him as Farris Walker, also known as Brownie Walker, *had purchased an ounce of heroin* and which did not have any stamp of the Treasury Department of the United States; and that this particular defendant was then in the process of bagging it up, partly by diluting that particular substance which he had just purchased, and was then in the process of diluting it and was going to make a sale of a portion of that substance; that it would not take him more, would not take the defendant more than a half an hour at the most before he would proceed to a 1950 or 1951 Pontiac, with the particular description of being a green automobile, which was parked immediately to the south of the alley just south of 43rd Street and the automobile was facing north. I'm sorry—the automobile was facing south on Forrestville, and would be on the west side of Forrestville; that this particular defendant, Farris Walker, is dressed, and would be dressed in a panama hat and brown suit, and he is described as a very slender man, about five feet five inches tall, weighing about 120 or 125 pounds, and that he would be in the company of one Kemp Wallis, and both of them were in the process of going out and making a sale to another individual. That, incidentally, the particular vehicle did not have any license plates, and that time was eminent insofar as if the agents were going to do anything concerning this particular defendant that he would be leaving in half an hour and he does not know where he would go, nor does he know the address of the particular—where the defendant was staying at the time."

able grounds for Walker's arrest and approval of the search. That defendant was traveling by automobile explains the need for action without a warrant. *Brinegar* v. *United States*, 338 U. S. 160, 175-178.

"Reasonable ground," then, is the litmus paper for testing validity of arrests without a warrant. Implicit in such test is the exclusion of arbitrary and capricious interference with individual freedom. Dignity and sanctity of the individual are not to be jeopardized by the whim or zeal of policemen. Consequently organic law, reflected in the relevant statutes and Rules of Criminal Procedure interposes the judiciary between law enforcement officers and citizens by requiring, as normal procedure, application for warrants and the attendant opportunity for the judicial branch to pass on the question of probable cause. This constitutional insulation against infringing basic rights is removed only under classes of exigencies which have been judicially approved on review and now form a discernible *pattern of instances, excusing law-enforcement officers for* by-passing the requirement of having the judiciary first rule upon the question of probable cause. In those situations the law is adjusted and imposes on the law enforcement agent a standard of discrimination. Rather than blind worship of cause alone, the law probes for the basis of the officer's action measuring it by an external standard. After all when an arrest without a warrant is classed as valid, it simply means such action is judicially tolerated as being within the constitutional bounds of reasonableness as officially or pragmatically defined in case-law. Fresh combinations of facts must necessarily be examined under the terms labelled "probable cause" and "reasonable grounds" for neither one is a static concept. But the criteria embedded in each continues to be one that refuses approval for arrests without a warrant where an officer is stimulated by an inkling only. For he must act as a man

of reasonable caution. "Suspicion" is an elusive word with a wide spectrum of intensities and courts must examine the facts underlying it rather than be deflected by the word itself.

Roviaro v. *United States*, U. S. Supreme Court, No. 58 (March 25, 1957) appears, on cursory examination, to cast a shadow across this opinion. But nothing said there requires any different decision in Walker's case despite the fact that an unnamed informer stimulated the agent's activities in this situation. Counsel for Walker did not request disclosure of the informer's identity, and he would have to make that request to come within this passage by the Roviaro majority:

> "Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a warrant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant *unless there was sufficient evidence apart from his confidential communication.*" [citing *Scher* v. *United States*, 305 U. S. 251; *United States* v. *Li Fat Tong*, 152 F. 2d 650; *Wilson* v. *United States*, 59 F. 2d 390; and *United States* v. *Keown, et al.*, 19 F. Supp. 639]. (Italics added).

In any event without a proper demand below for the informer's identity* this case is outside the scope of the

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*Nor was there any assertion of privilege on the government's part, in this appeal, as discussed in *Jencks* v. *United States*, No. 23 U. S. Supreme Court, 25 L. W. 4365 (1957). In *Jencks*, after observing that the testimony of Ford and Matusow were crucial to the government's case during the trial of Jencks, it was said for the majority: "We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession . . . touching the events and activities as to which they *testified* at the trial." (Our italics.) We make this mention of the *Jencks* case where numerous requests were made by the defense for the F.B.I. reports, solely for distinguishing it from *Walker* in which no demands of any kind were made of the government by the defense.

Roviaro holding. See *United States* v. *Conforti*, 200 F. 2d 365 (7th Cir. 1953). That *Contee* v. *United States*, 215 F. 2d 324, 326 (D. C. App. 1954) is inapposite is patent from the flimsy testimony given by the arresting officers, in that appeal.

By overruling the motion to suppress, interposed on Walker's behalf, the trial judge reached the correct result, and we affirm the judgment brought here for review.

JUDGMENT AFFIRMED.

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IN THE

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OCTOBER TERM, 1957

No. 394

HERMAN DAVID,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

This Reply Brief is required to correct some inaccurate statements appearing in the Government's Brief, which are not justified by the record.

For instance, at page 3 of its Brief, the Government states that Witness Hambach "was told by a reliable informer named Willie Jones, whose information Hambach had used on previous occasions, that petitioner had been delivering alcohol to 4502 Vincennes Avenue in Chicago (R. 59)."

Again, at page 6 of its Brief, the Government states that its agents had "reliable information from a *previously tested informer* that petitioner had been delivering alcohol at a known speakeasy where successful raids had been made."

The actual testimony of Government Witness Hambach is: "We had received information from a reliable source that he was delivering alcohol to this address." The reliable source was an informer whom the witness knew as Willie Jones, but didn't know where Willie Jones lived. Willie Jones used to call him from time to time, and Hambach would meet Willie Jones at appointed places on the South side (R. 59).

Calling an informer a reliable source of information is a conclusion. But testifying that the informer *had been previously tested,* and had been found reliable, may be an element in determining probable cause. Apparently the Government made its inaccurate statements in its Brief, knowing that the accurate testimony could not be considered as an element of probable cause. The agents had no evidence whatever from any source, including Willie Jones, that the defendant, on November 20, 1953, was about to deliver, or intended to deliver, alcohol to 4502 Vincennes Avenue (R. 59, 60).

At page 6 of the Government's Brief, it states as an element of a "composite picture" that the "surveillance of petitioner on one occasion when he *surreptitiously* took *two loaded shopping bags into the speakeasy*, and then emerged with empty bags." According to Witness Hambach, this incident took place in broad daylight and not surreptitiously. On the day in question, November 6th, at 8:00 o'clock in the morning, he saw the petitioner drive his automobile to the intersection of South Park and 45th Street at which point he contacted Investigator Fletcher by radio (R. 44, 45). The testimony of Agent Fletcher is

that he saw the petitioner get out of the car, look around, and take two shopping bags out of the rear of his automobile, and that the petitioner took them into the side entrance of the building at 4502 South Vincennes Avenue. There was *no* testimony that petitioner took the bags *into a speakeasy*. Ten minutes later he came out with two empty shopping bags (R. 74). Fletcher didn't look in the shopping bags (R. 80), nor make an arrest of the petitioner at that time, nor did he seek a search warrant for the search of the premises at 4502 Vincennes Avenue, nor make an arrest at that address (R. 80). It was his duty to make an arrest if he saw a violation of the law.

There is no evidence as to what the shopping bags contained when petitioner carried them into 4502 Vincennes Avenue, nor any evidence that they were "loaded." There was nothing in the carrying of these shopping bags that could give rise to even a suspicion that they held containers of alcohol.

At another point, as an element of probable cause to make a search by the agents, the Government states, at page 6 of its Brief, that the agents had knowledge "from their sense of sight that the shopping bags in petitioner's automobile parked near the speakeasy contained jugs with a liquid which was *probably* alcohol." The use of the word "probably" in the foregoing statement defeats the Government's contention that the agents had any knowledge from their sense of sight that the shopping bags contained jugs of alcohol. The Government overlooks the positive testimony of Agent Roseboro that he saw the *necks* of two jugs but did not see the liquid at the time (R. 66). He testified he did not see any moonshine in the car before the search or prior thereto (R. 66, 67). At the time of the search he either had to taste the liquid or smell it before he knew that distilled spirits were in the car and he, there-

fore, put his finger in one of the bottles in order to taste it and to smell it (R. 67).

On the basis of the accurate facts testified to by the Government witnesses, as they appear in the record, there was no probable cause for making a search of petitioner's car. On the exaggerated and inaccurate statements of the essential facts appearing in the Government's Brief, there could be probable cause for the search. This situation in which the Government feels it necessary to urge inaccurate facts in order to clothe the agents with probable cause for making the search and seizure, is an emphatic concession that the true facts appearing in the record did not justify the search, and that the agents had no probable cause to make the same.

With respect to the destruction of the jugs and the shopping bags, the Government overlooks the point urged by the petitioner in his Petition for Certiorari. The Government justifies the failure to produce the shopping bags and the jugs by a custom in the Alcohol Department of destroying such material, if, in the opinion of the department, they will not be necessary for evidence in a trial. This custom was sanctioned and justified by the Court of Appeals for the Seventh Circuit in its opinion. The point urged by the petitioner is that such a custom should not receive the sanction of a Court of Appeals; that it is not within the province of the Alcohol Department to determine what evidence should or should not be produced.

There was a conflict of testimony as to the comparative size of the jugs and the shopping bags. The petitioner urged that the tops of the shopping bags were so far above the tops of the jugs that one could not see any liquid in the jugs. At page 4 of the Government's Brief, in a footnote, its attorneys state:

> "The agents estimated the height of the bags as between 12 and 24 inches, and the height of the jugs

as between 10 and 12 inches (R. 58, 68). Petitioner testified that the jugs were about 11 inches high, and that the tops of the bags were about 8 or 10 inches above the tops of the jugs (R. 35)."

Agent Roseboro estimated that the bags were 10 or 12 inches in height (R. 69). If that was a fact, the jugs could easily have been seen, since Agent Hambach testified that the jugs were 10 to 12 inches in height. But Agent Roseboro, on a previous occasion, testified that the bags were two feet in height and that his recollection at that time was better than at the time of his current testimony (R. 70).

The petitioner again emphasizes that the Government agents should not be the judges of what evidence should be retained and produced in Court, and what evidence might be destroyed and not produced in Court.

With respect to the opinion in the case of *United States* v. *Walker*, set forth in full at pages 6-A to 23-A, the Government states in the footnote at page 7 of its Brief: "While the court below refers to *Walker*, it does not treat that case as directly in point on its facts, but merely as enunciating some general principles applicable." This note of the Government overlooks that the opinion of the Seventh Circuit recited that much of what it said in the *Walker* opinion "governs the deposition of this appeal" (Pet. App. 1-A). The case of *United States* v. *Walker* again is cited at page 2-A of the Petitioner's Appendix to support the Seventh Circuit statement, "The strong showing of probable cause dissipates any doubt about the correctness of denying the defense motion to suppress the evidence."

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 394

HERMAN DAVID, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 99-101;[1] Pet. App. 1A-3A) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (R. 102; Pet. App. 4A). A petition for rehearing was denied on July 23, 1957 (R. 103; Pet. App. 5A). The petition for a writ of certiorari was filed on August 22, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "R." refers to the printed Appellant's Appendix in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether there was probable cause for government agents to search petitioner's automobile without a warrant.

2. Whether there was a presumption that certain evidence (shopping bags and jugs), if produced, would have been unfavorable to the government, where such evidence had been destroyed in accordance with a custom of retaining only necessary samples of illicit alcohol.

STATEMENT

Petitioner was charged in a two-count indictment in the United States District Court for the Northern District of Illinois with unlawful possession of five gallons of tax unpaid distilled spirits in violation of 26 U.S.C. 2803(a), and with unlawful concealment of these spirits with intent to defraud the United States of the tax thereon in violation of 26 U.S.C. 3321(a) (R. 10). At a trial before the court without a jury, petitioner was found guilty (R. 24, 30). He was sentenced to imprisonment for two years (R. 88). On appeal (R. 91), the conviction was affirmed, one judge dissenting (R. 99-102; Pet. App. 1A-4A).

Prior to the trial, petitioner filed a petition to suppress as evidence five gallons of alcohol, five glass jugs, and two shopping bags which government agents had seized in petitioner's automobile on November 20, 1953 (R. 12-14). Subsequent to a hearing on the motion (R. 31-87), the court in a memorandum

opinion denied the motion to suppress (R. 22-24). At the trial, it was stipulated that the evidence presented at the suppression hearing should be submitted to the court "on the question of the guilt or innocence of the defendant" (R. 24, 26, 29).

Evidence adduced at the suppression hearing may be summarized as follows:

Petitioner was being investigated as a liquor law violator by government agents Hambach, Rosgboro, and Fletcher (R. 42, 62, 72). About November 1, 1953, Hambach was told by a reliable informer named Willie Jones, whose information Hambach had used on previous occasions, that petitioner had been delivering alcohol to 4502 Vincennes Avenue in Chicago (R. 59). This address was known to the agents as that of John Binyon, known as "Big John", who operated a speakeasy where illicit alcohol had been seized several times (R. 49, 59, 66, 80). Hambach knew that petitioner had been arrested several times, and had once been convicted for unlawful possession of alcohol (R. 47). See *United States* v. *David*, 107 F. 2d 519 (C.A. 7).

On November 6, 1953, agent Hambach followed petitioner in a Packard sedan from petitioner's home in Dolton, Illinois, to 45th and South Park Avenue in Chicago. By car radio, Hambach gave the license number of the Packard to agent Fletcher to take over the pursuit (R. 44-45). Fletcher saw petitioner park near 4502 Vincennes Avenue, wait about five minutes, remove two shopping bags from the rear of the car, and take them into the building at this address. Upon leaving about ten minutes later, peti-

tioner was seen carrying two empty shopping bags (R. 73-74).

According to testimony of the government agents, on November 20, 1953, petitioner parked his Packard near 4502 Vincennes Avenue (R. 55, 56, 64, 75). Agent Roseboro walked to the driver's side of petitioner's car, showed his credentials as a federal officer, asked what was in the car, and received petitioner's reply, "Nothing" (R. 56-57, 64). Roseboro looked in the back of the car on the floor and saw two shopping bags and the necks of what appeared to be one-gallon jugs (R. 64, 66). When Hambach pulled up in another automobile, he alighted and saw in the back of petitioner's car a shopping bag with three one-gallon jugs containing a colorless liquid (R. 46, 50, 56-57, 58, 59).[2] Roseboro then searched the car, and tasted and smelled the alcohol in the jugs, which were without Internal Revenue stamps. After Roseboro stated that the liquid was whisky, Hambach arrested petitioner, and seized the two shopping bags and five one-gallon jugs (R. 46, 65, 75-76). The agents did not have a search warrant or a warrant for petitioner's arrest (R. 34, 55). Petitioner told Hambach that he had been in financial difficulty, and had been buying moonshine for $6.00 and selling it for $7.00 per gallon (R. 47).

Petitioner's testimony as to what occurred on No-

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[2] The agents estimated the height of the bags as between 12 and 24 inches, and the height of the jugs as between 10 and 12 inches (R. 58, 68). Petitioner testified that the jugs were about 11 inches high, and that the tops of the bags were about 8 or 10 inches above the tops of the jugs (R. 35).

vember 20, 1953, conflicted with that of the agents. His version was that Roseboro placed him under arrest before, not after, the search of the car (R. 34). He stated that the necks of the jugs were not visible to a person looking into the car, since the tops of the bags were about 8 inches above the tops of the jugs, which were covered with paper (R. 35).

After petitioner's arrest, agent Fletcher, using a pint bottle, took a composite sample from each of the five jugs, which he delivered to the government chemist for analysis (R. 76). The admission that the jugs contained alcohol was made in petitioner's testimony on the motion to suppress, and by stipulation between counsel (R. 35, 29). Later, the shopping bags and jugs were destroyed, but samples of the alcohol were retained. This was in accordance with the custom of the Alcohol and Tobacco Tax Unit to keep only alcoholic samples and to destroy the containers unless needed for a particular evidentiary purpose, such as that of showing fingerprints (R. 50-51, 67).

ARGUMENT

1. Petitioner's principal contention is that there was an unlawful search and seizure of the illicit alcohol from his automobile (Pet. 13-23). There was, however, probable cause for the search and seizure without a warrant. There were facts and circumstances within the government agents' knowledge, and of which they had reasonably trustworthy information, which were sufficient to warrant a belief by them as men of reasonable caution that a crime

was being committed. Cf. *Brinegar* v. *United States*, 338 U.S. 160; *Carroll* v. *United States*, 267 U.S. 132; *Husty* v. *United States*, 282 U.S. 694; *United States* v. *One 1946 Plymouth Sedan Automobile*, 167 F. 2d 3, 7-8 (C.A. 7); *United States* v. *O'Brien*, 174 F. 2d 341, 345-346 (C.A. 7); *Cassidy* v. *United States*, 49 F. 2d 504 (C.A. D.C.).

Salient facts and circumstances viewed as a composite picture disclose probable cause, making the search and seizure here reasonable. These include knowledge by the agents of petitioner's previous arrests and conviction for unlawful possession of alcohol; reliable information from a previously tested informer that petitioner had been delivering alcohol at a known speakeasy where successful raids had been made; surveillance of petitioner on one occasion when he surreptitiously took two loaded shopping bags into the speakeasy, and then emerged with empty bags; and knowledge by the agents from their sense of sight that the shopping bags in petitioner's automibile parked near the speakeasy contained jugs with a liquid which was probably alcohol.

There is no conflict in decisions to warrant certiorari (see Pet. 18-21). Unlike the situation here where petitioner parked his car before the agents approached, in *Clay* v. *United States*, 239 F. 2d 196, 200 (C.A. 5), a "citizen was forceably run down and driven off the highway", and in *Emite* v. *United States*, 15 F. 2d 623 (C.A. 5), an agent followed the defendant's car 10 miles and stopped it. Other features distinguishing *Emite* from the instant case are the fact that there the agent did not see or smell

liquor until after he had opened the door of the automobile, and the informer was "unidentified". *Brown v. United States*, 4 F. 2d 246 (C.A. 9), does not involve the search of an automobile, but rather an illegal arrest made upon mere suspicion. The quoted language in *Wisniewski v. United States*, 47 F. 2d 825 (C.A. 6), is dictum, and defendant's conviction there was affirmed.[3]

2. Petitioner argues that, since the government agents destroyed the shopping bags and one-gallon jugs, the court below should have found that there was a presumption that, if such evidence had been produced, it would have been unfavorable to the government and favorable to petitioner (Pet. 3, 23-24). Petitioner asserts that production of this evidence would have shown that the jugs when placed in the bags would not have been visible to one looking into the automobile (see R. 35).

This contention overlooks government testimony as to the custom of the Alcohol and Tobacco Tax Unit to retain only alcoholic samples, and to destroy the containers unless needed for an anticipated evidentiary purpose (R. 51). There is no showing that the property was destroyed in anticipation of litigation for the purpose of wrongful suppression. The explanation of

[3] We agree with petitioner (Pet. 15) that *United States v. Walker* (C.A. 7), decided June 10, 1957 (Pet. App. 6A-23A), involves primarily a lawful arrest made prior to the search, which was held valid as incidental to the arrest; whereas in the instant case, the search preceded the arrest. While the court below refers to *Walker*, it does not treat that case as directly in point on its facts, but merely as enunciating some general principles applicable.

its destruction was reasonable and satisfactory so as to eliminate a possible unfavorable presumption against the government arising from its non-production. Cf. *Mastin* v. *Noble*, 157 Fed. 506, 513 (C.A. 8); *McDonald* v. *United States*, 89 F. 2d 128, 137, 138 (C.A. 8), certiorari denied, 301 U.S. 697; Wigmore on *Evidence*, 3d ed., Sec. 290 (3).

Since the agents were standing on the street and looking downward at the bags, it was reasonable for the court to believe that they could see the necks of the jugs through the tops of the open bags, even though the jugs were admittedly not as tall as the bags. The court was not required to accept petitioner's testimony that there was paper on top of the jugs in the bag. The court was thus at liberty to find credible, as it did, the testimony of the agents that the "necks of the jugs and their colorless fluid contents were clearly visible to them when they looked through the windows of the automobile" (R. 23).

CONCLUSION

The case was decided in accordance with established legal principles, and there is no conflict in decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1957.